See Love v. Wells
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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1950

No. [redacted] 61

GLADYS NOEL BATES and RICHARD JESS BROWN, Individually and on Behalf of the Negro Teachers and Principals in the Jackson Separate School District,

Petitioners,

vs.

JOHN C. BATTE, President; R. M. HEDERMAN, JR., Secretary; R. W. NAEF, W. R. NEWMAN, JR., and W. D. MCCAIN, Constituting the Board of Trustees of Jackson Separate School District and K. P. WALKER, Superintendent of Jackson Separate Schools,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF AND APPENDIX.

ROBERT L. CARTER,

THURGOOD MARSHALL,
20 West 40th Street,
New York 18, New York,
Attorneys for Petitioners.

JAMES A. BURNS,
CONSTANCE BAKER MOTLEY,
Of Counsel.

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IN THE

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October Term, 1950

No. .....

GLADYS NOEL BATES and RICHARD JESS BROWN, Individually and on Behalf of the Negro Teachers and Principals in the Jackson Separate School District,
Petitioners,

vs.

JOHN C. BATTE, President; R. M. HEDERMAN, JR., Secretary; R. W. NAEF, W. R. NEWMAN, JR., and W. D. MCCAIN, Constituting the Board of Trustees of Jackson Separate School District and K. P. WALKER, Superintendent of Jackson Separate Schools,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the District Court of the United States for the Southern

District of Mississippi dismissing this action on the ground that petitioners had failed to exhaust administrative remedies provided by the laws of the State of Mississippi.

Summary Statement of the Matter Involved.

This suit was filed in the United States District Court for the Southern District of Mississippi on March 4, 1948. The suit was originally brought by Gladys Noel Bates, individually, and on behalf of the Negro teachers and principals in the Jackson Separate School District. The gravamen of her complaint was that the respondents were discriminating against her and all other Negro teachers and principals similarly situated in the fixing and payment of teachers' salaries solely because of race and color in violation of the equal protection clause of the Fourteenth Amendment to the Federal Constitution (R. 3-15).

This suit was brought pursuant to the provisions of Title 8, United States Code, Section 43, and the jurisdiction of the District Court was invoked pursuant to the provisions of Title 28, United States Code, Section 1343(3) (R. 3-4).

On February 7, 1948, prior to filing suit in the District Court, petitioner Gladys Noel Bates filed a petition with the respondents on behalf of herself and other Negro teachers and principals in the public school system of Jackson, Mississippi, alleging unconstitutional discrimination in the fixing and payment of teachers' salaries and petitioning for an abandonment and cessation of such practices (R. 66-67). Respondents in reply to this petition advised the original plaintiff by letter that they had no knowledge of any such discrimination (R. 89).

On May 5, 1948, the respondents, defendants in the District Court, moved to dismiss the complaint on the ground,

inter alia, that the plaintiff, petitioner Gladys Noel Bates, had failed to exhaust administrative remedies provided by the laws of the State of Mississippi (R. 16-17). This motion was denied on December 20, 1948 (R. 18). On February 15, 1949, respondents filed their answer (R. 19-38) and moved for summary judgment (R. 19), which motion was denied on July 15, 1949 (R. 61).

In the interim, respondents refused to renew their contract with Mrs. Bates because of her participation in this suit (R. 163, 244). On May 9, 1949, petitioner Richard Jess Brown filed a motion to intervene as party-plaintiff in the District Court which was granted on December 12, 1949 (R. 66).

This cause came to trial on December 12, 1949. Before proceeding with the taking of testimony, the trial court again ruled that the defense of failure to exhaust administrative remedies was insufficient in law, that the administrative remedies provided were inadequate and had reference only to those controversies arising under the school laws of the State of Mississippi; that this controversy arose not under the school laws of Mississippi, but under the Constitution of the United States and that, therefore, the statutory provisions on which respondents relied need not have been pursued before bringing this action (R. 63-64).

After trial, but before judgment, the United States Court of Appeals for the Fifth Circuit, decided the case of *Cook* v. *Davis,* 178 F. (2d) 595 (1949), cert. denied, 340 U. S. 811 (1950). In that case, the court below reversed a judgment of the United States District Court for the Northern District of Georgia, which had entered judgment enjoining and restraining the defendants from paying to the plaintiff and other Negro teachers and principals in the public schools of Atlanta, Georgia, less salaries than was paid to

white teachers and principals of equal qualifications and experiences and performing substantially the same duties solely because of race and color in violation of the equal protection clause of the Fourteenth Amendment, on the ground that state administrative remedies had not been exhausted.

On February 22, 1950, the District Court rendered an opinion dismissing the complaint herein without prejudice on the ground that the plaintiff had failed to exhaust administrative remedies (R. 253, 256). The trial court stated that it did so reluctantly but felt that it was bound by the decision of the United States Court of Appeals for the Fifth Circuit in the *Cook* case. The trial court stated that it was still of the opinion that the administrative remedies provided by the laws of the State of Mississippi were inadequate (R. 253), and made findings of fact and conclusions of law in its opinion in order that the appellate court might have before it the whole case (R. 253).

It found that the wide differential between the salaries paid to Negro teachers and principals and those paid to white teachers and principals could only have resulted from racial discrimination in violation of the equal protection clause of the Fourteenth Amendment (R. 248). It further found that as to petitioners Gladys Noel Bates and Richard Jess Brown less salary was being paid to them than was being paid to white teachers of equal qualification and experience and performing substantially the same functions (R. 247). The trial court held, however, that the failure of respondents to renew the contract of Mrs. Bates was not illegal (R. 256-257) in spite of the fact that evidence was produced at the trial to show that Mrs. Bates had not been reemployed solely because of her participation in this action (R. 136, 137, 159, 162, 163, 164). Final judgment was

entered March 22, 1950. Notice of Appeal was filed on March 20, 1950 (R. 258).

The argument before the United States Court of Appeals took place on January 24, 1951 (R. 296). That court affirmed the judgment of dismissal of the District Court on February 15, 1951. In affirming the judgment of the District Court, it ruled that this case was governed by *Cook* v. *Davis, supra* (R. 298). Whereupon, petitioners bring the cause here by this petition for writ of certiorari.

Statement of Facts.

Petitioners do not set forth a detailed statement of the factual evidence produced at the trial showing the existence of discrimination in the payment of teachers salaries. The inclusion of this matter petitioners deem immaterial for the reason that that issue is not before this court. However, a brief resume of the essential facts follows in order to give this Court a more complete picture of the entire case.

The respondents, upon the trial, freely admitted that Negro teachers were paid less salary than white teachers (R. 69, 79, 106, 208, 210, 212). Witnesses for respondents testified that as to character, professional qualifications and academic training, there was no difference between Negro and white teachers (R. 113-114). In summary, the respondents attempted to justify the higher pay to white teachers on the ground that such teachers were better able to use their training and organize their work and were further advanced culturally than were the Negro teachers and principals (R. 100-154).

Petitioners engaged the services of a professional statistician who made a statistical analysis of all of the records of the respondents with respect to salaries. This analysis is contained in Exhibit #9 which has been transmitted to

this court in its original form as a part of the record. This study shows that although Negro teachers and principals compared favorably with white teachers and principals in training and experience and types of certificates held, their rate of compensation was far below that of white teachers and principals in every category and at every level in the public school system. For example, as between white principals and Negro principals at the senior high school level, there was a salary differential of 110 percent (R. 187); at the junior high school level, 111.54 percent (R. 187); at the elementary school level, 81.32 percent (R. 187). As between white and Negro teachers at the senior high school level, the differential was 57.65 percent (R. 187); at the junior high school level, 46.40 percent (R. 187); and at the elementary school level, 53.30 percent (R. 187). These facts were not disputed by appellees.

The trial court found that petitioners and other Negro teachers and principals were being discriminated against in the payment of salaries and, except for the decision in *Cook* v. *Davis,* would have entered judgment for petitioners.

The Opinion of the Court of Appeals.

The United States Court of Appeals for the Fifth Circuit in affirming the judgment of the trial court relied on its own decision in the case of *Cook* v. *Davis, supra* (R. 298). Without going into the similarities and dissimilarities between the Georgia and Mississippi statutes, the Court simply stated that "the statutes of the two states are sufficiently alike to make the decision in *Cook's* case dispositive of the appeal." The Court affirmed the judgment of dismissal for failure to exhaust administrative remedies. The opinion of the Court of Appeals is reported. *Bates* v. *Batte,* 187 Fed. (2d) 142 (1951) (Adv. Op.).

Jurisdiction.

The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code, Section 1254. This is a case arising under the Constitution and laws of the United States and involves rights secured by the Fourteenth Amendment to the Federal Constitution, and was brought to enforce a right conferred by act of Congress.

In the original complaint filed by petitioner Gladys Noel Bates and in the complaint filed by the intervenor-plaintiff, Richard Jess Brown, and throughout the entire proceedings, petitioners have maintained that the action of respondents in paying them and the other Negro teachers and principals in the Jackson, Mississippi, Separate School District less salaries than is paid to white teachers and principals of equal qualifications and experience is a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Federal Constitution.

Questions Presented.

I.

Whether the rule which requires that administrative remedies be exhausted before seeking relief from a federal court is properly invoked in an action brought pursuant to Act of Congress where the Congress has not conferred on an administrative agency primary exclusive jurisdiction to hear and determine such cases?

II.

Whether the rule which requires that administrative remedies be exhausted before seeking relief from a federal court is properly invoked in an action in a federal district court which has been brought to redress the deprivation

under color of state statute, regulation, custom and usage of a right, privilege or immunity secured by the Constitution and laws of the United States as provided by Title 8 U. S. C. § 43 and Title 28 U. S. C. § 1343(3)?

III.

Whether the State of Mississippi has provided an administrative remedy which must be pursued by a teacher complaining of unconstitutional discrimination in the fixing and payment of teachers' salaries before seeking the aid of a federal district court to enjoin such discrimination in accordance with the provisions of Title 8 U. S. C. § 43 and Title 28 U. S. C. § 1343(3)?

Reasons Relied Upon for Allowance of Writ.

I.

The rule which requires that administrative remedies be exhausted prior to resorting to a federal court for relief is a rule which is applied by this Court in cases involving Acts of Congress only where there is clearly expressed or implied a legislative intent or design to confer on an administrative agency, whether state or federal, primary exclusive jurisdiction to hear and determine certain matters, with express power to remedy, *Securities & Exchange Commission* v. *Otis,* 338 U. S. 843 (1949), *Rice* v. *Santa Fe Elevator Corp.,* 331 U. S. 218 (1947), *Aircraft & D. Equipment Corp.* v. *Hirsch,* 331 U. S. 752 (1947), *Federal Power Commission* v. *Arkansas Power & Light Co.,* 330 U. S. 802 (1947), *Macauley* v. *Waterman Steamship Corp.,* 327 U. S. 540 (1946), *Order of Railway Conductors* v. *Pitney,* 326 U. S. 561 (1946), *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41 (1938), *United States* v. *Sing Tuck,* 194 U. S. 161 (1904); and when this Court has found no such Con-

gressional intent or design or agency power, pleas for application of the rule have been denied. *United Public Workers* v. *Mitchell,* 330 U. S. 75 (1947), *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission,* 328 U. S. 152 (1946), *Georgia* v. *Penn. R. R. Co.,* 324 U. S. 439 (1945), *United States Alkali Export Ass'n Inc.* v. *United States,* 325 U. S. 196 (1945), *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen,* 323 U. S. 210 (1944), *Steele* v. *Louisville & Nashville R. R. Co.,* 323 U. S. 192 (1944).

In providing by Title 8 U. S. C. § 43 for the right of redress, in law or equity or other proper proceeding, against "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or Territory, subjects or causes to be subjected a citizen of the United States, or other persons within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws", the Congress of the United States did not, either expressly or impliedly, confer on an administrative agency, whether state or federal, primary exclusive jurisdiction to hear and determine whether such deprivation had occurred, with power to remedy, but conferred upon the district courts of the United States, by the express provisions of Title 28 U. S. C. § 1343(3), original jurisdiction in such cases without attaching thereto any jurisdictional prerequisites.[1]

[1] Title 28 U. S. C. § 1343(3) provides:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

"(3) To redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States." (June 25, 1948, c. 646, § 1, 62 Stat. 932.)

Smith v. *Allwright*, 321 U. S. 649 (1944), *Douglas* v. *Jeannette*, 319 U. S. 157 (1943), *Hague* v. *C. I. O.*, 307 U. S. 496 (1939), *Bottone* v. *Lindsley* (C. A. 10), 170 F. (2d) 705 (1948), *Glicker* v. *Michigan* (C. A. 6), 160 F. (2d) 96 (1947), *City of Manchester* v. *Leiby* (C. A. 1), 117 F. (2d) 661 (1941).

The decision of the court below is, therefore, not in accord with the decisions of this Court in cases involving Acts of Congress.

II.

The rule of exhaustion of administrative remedies was applied for the first time by a federal court of appeals in a case of this kind, as far as counsel for petitioners have been able to ascertain, in *Cook* v. *Davis* (C. A. 5), 178 F. (2d) 595 (1949), cert. denied 340 U. S. 811, a case decided after trial in the instant case but just prior to the district court's decision herein and relied on by the district court and the court below in dismissing this action. A jurisdictional prerequisite to bringing a case pursuant to Title 8 U. S. C. § 43 and Title 28 U. S. C. § 1343(3) has thus been added by judicial fiat. cf. *Slocum* v. *Delaware, Lackawana & Western R. Co.*, 339 U. S. 239 (1950), *Armour & Co.* v. *Alton R. R.*, 312 U. S. 195 (1941), *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 52 (1938), *Board of Railroad Com'rs* v. *Great N. Ry.*, 281 U. S. 412 (1930), *Great N. Ry.* v. *Merchants Elevator Co.*, 259 U. S. 285, 290 (1922), *Robinson* v. *Baltimore & Ohio Railroad*, 222 U. S. 506 (1912), *Texas & P. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1907).

Thus the judgment of the court below, affirming the judgment of the district court reluctantly rendered after petitioners succeeded on the merits, that this action must

be dismissed for failure of petitioners to exhaust state administrative remedies is not in accord with the intent of Congress that the district courts of the United States have original jurisdiction of civil actions brought to enforce the right conferred by Title 8 U. S. C. §43.

III.

This Court denied a petition for writ of certiorari in the *Cook* case, *Davis* v. *Cook,* cert. denied 340 U. S. 811 (1950), but the petition therein did not present for consideration the questions here presented—the major one being whether the rule of exhaustion of administrative remedies is properly invoked in an action brought pursuant to Title 8 U. S. C. §43 in a district court of the United States pursuant to Title 28 U. S. C. §1343(3). Therefore, the main question here presented is squarely before this Court for the first time. See, *Lane* v. *Wilson,* 307 U. S. 268, 274 (1939); *Mitchell* v. *Wright* (C. A. 5), 154 F. (2d) 924, 928, cert. denied 329 U. S. 733 (1945).

IV.

The facts in this case are materially different from the facts in the *Cook* case. In the latter case, the defendant local Board of Education, after the institution of the action in the federal court, adopted a new salary schedule. The court below was of the opinion that unconstitutional discrimination had been eliminated from the new schedule and that the discrimination which still existed resulted from the dual salary schedule established by the State Board of Education. The State Board in that case had the power, Georgia Code Ann. 32-613, to fix a schedule of minimum salaries to be paid to teachers out of the public school funds of the state, and although the local boards could supplement this salary, they were bound to pay

every teacher this minimum. In addition, the State Board in Georgia was empowered to determine the minimum number of teachers which each local board might employ and to classify such teachers. It disbursed school funds to the various local boards on the basis of the minimum standards which it established. The State Board was not made a party defendant, although it was an indispensable party to the action because of the power it exercised with respect to teachers' salaries. Without having jurisdiction over the State Board, the issue of salary discrimination could not have been completely determined by the court in the *Cook* case.

In the instant case, the State Board has no power to fix teachers' salaries. The trial court found that it was the exclusive duty of the respondent board to select teachers and fix their salaries (R. 249, 250). The State Board has only general supervisory powers over the schools and disperses the school funds on a per capita basis. It does not even have power to determine what portion of the funds so dispersed may be used for teachers' salaries. Therefore, the determination as to salaries made by the respondent board in this case is final. The State Board in this case was therefore not a necessary defendant or a proper agency to which to appeal. Even if petitioner appealed to the State Board, that agency could take no action determinative of the issues herein presented.

The court below did not direct the district court to retain jurisdiction of this cause until the alleged administrative remedies had been exhausted, as was done in the *Cook* case. Instead, the court below affirmed the judgment of dismissal, thus indicating that the district court had no jurisdiction until the alleged remedies had been exhausted.

The material and controlling facts in the *Cook* case are therefore entirely different from those in the instant case

and, therefore, the *Cook* decision, contrary to the decision of the court below, cannot govern the disposition of this case.

V.

On motion for rehearing which was denied, the court below in the *Cook* case held that the rule of exhaustion of administrative remedies "is a rule of self-restraint formulated by the federal courts and is not influenced by state practice". This reasoning was relied on by the district court in the instant case. In cases arising under Acts of Congress, this Court has looked to the statute passed by the Congress to determine whether the Congress intended exhaustion of administrative remedies to be a jurisdictional prerequisite. *Slocum* v. *Delaware, Lackawanna & Western R. Co., supra; Armour & Co.* v. *Alton R. R., supra; Board of Railroad Com'rs* v. *Great N. Ry., supra; Great N. Ry.* v. *Merchants Elevator Co., supra; Myers* v. *Bethlehem Shipbuilding Corp., supra; Robinson* v. *Baltimore & Ohio Railroad, supra; Texas & P. Ry.* v. *Abilene Cotton Oil Co., supra.* Therefore, with respect to cases involving Acts of Congress, as in the instant case, the rule of exhaustion of administrative remedy is not applied by this Court as a matter of judicial self-restraint, especially when Congress has indicated specifically that jurisdiction is in federal courts, but is applied only where there is clearly expressed or implied a legislative intent or design to confer on an administrative agency, whether state or federal, primary exclusive jurisdiction to hear and determine certain matters before invoking the jurisdiction of a federal court.

VI.

Title 8 U. S. C. § 43 is one of the Civil Rights Acts passed by the Congress immediately after adoption of the Fourteenth Amendment to the Federal Constitution pursu-

ant to the provisions of Section 5 of the Amendment which specifically empowered the Congress "to enforce, by appropriate legislation" the provisions of the Amendment.[2] This Act granted "a right of action sounding *in tort* to every individual whose federal rights are trespassed upon by an officer acting under pretense of state law".[3] In other words, "a field was created upon which a state officer could not tread without being guilty of trespass and liable in damages"[4] in action at law, *Nixon* v. *Herndon,* 273 U. S. 536 (1927); *Smith* v. *Allwright, supra;* see, *United States* v. *Classic,* 313 U. S. 299, 323-324 (1941) and *Screws* v. *United States,* 325 U. S. 91, 99 (1945); *Picking* v. *Penn. R. Co.* (C. A. 3), 151 F. (2d) 240 (1945); *Burt* v. *City of New York* (C. A. 2), 156 F. (2d) 791; *Bottone* v. *Lindsley, supra;* or without subjecting himself to an injunction in a suit in equity, *Hague* v. *C. I. O.,* 307 U. S. 496 (1939); *Morris* v. *Williams* (C. A. 8), 149 F. (2d) 703 (1945); *Westminster School District, etc.* v. *Mendez* (C. A. 9), 161 F. (2d) 774 (1947); *Rice* v. *Elmore* (C. A. 4), 165 F. (2d) 387 (1947).

Title 8 U. S. C. § 43 therefore conferred a right. It conferred a right to bring an action either in law or in equity to redress the deprivation, under color of state law, custom, or usage, of rights, privileges, and immunities se-

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[2] The legislative history of this act is found in Congressional Globe 42nd Congress, 1871, First Session, Part 1, report on H.R. No. 320, p. 317 and debate pp. 385, 395, 461 and 495, and Part 2, Appendix, pp. 86, 113, 209 and 217, 217.

The Act provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." Act of April 20, 1871, Chap. 22, 17 Stat. at L. 13, Revised Statutes, § 1979.

[3] *Picking* v. *Penn R. Co.* (C. A. 3), 151 F. (2d) 240, 249 (1945).

[4] *Ibid.*

cured by the Federal Constitution. The right not to have race discrimination play a part in the fixing and payment of teachers' salaries is a right secured by the Fourteenth Amendment to the Federal Constitution. *Alston* v. *School Board* (C. A. 4), 112 F. (2d) 992 (1940), cert. denied 311 U. S. 693. Protection of this right does not involve a determination of the salary which should be paid to an individual teacher or even a class of teachers. *Alston* v. *School Board, supra; Morris* v. *Williams* (C. A. 8), 149 F. (2d) 703. An action such as this, which is brought in equity to protect this right with respect to the future, is thus not an action which requires that the court be substituted for an administrative agency—it is one brought to eliminate from the administrative determination unconstitutional discrimination in the future. cf. *Georgia* v. *Penn. R. R.*, 324 U. S. 439 (1945). The right to bring such an action initially in a federal court is specifically authorized by Act of Congress. Title 28 U. S. C. § 1343(3).

Once these rights are established, the whole concept of exhaustion of administrative remedies is inapplicable for the simple reason that no administrative determination is involved.

VII.

Since the enactment of Title 8 U. S. C. § 43, numerous actions have been successfully brought via Title 28 U. S. C. § 1343(3) in the federal district courts without the necessity of meeting any jurisdictional prerequisites other than those set forth in said statutes. *Smith* v. *Allwright*, 321 U. S. 649 (1944); *Douglas* v. *Jeannette*, 319 U. S. 157 (1943); *Hague* v. *C. I. O.*, 307 U. S. 496 (1939); *Bottone* v. *Lindsley* (C. A. 10), 170 F. (2d) 705 (1948); *Glicker* v. *Michigan* (C. A. 6), 160 F. (2d) 96 (1947); *Westminster School District* v. *Mendez* (C. A. 9), 161 F. (2d) 774 (1947); *Rice* v. *Elmore* (C. A. 4), 165 F. (2d) 387 (1947); *Morris* v. *Williams* (C. A. 8), 149 F. (2d) 703

(1945); *City of Manchester* v. *Leiby* (C. A. 1), 117 F. (2d) 661 (1941); *Johnson* v. *Board of Trustees,* (D. C.-Ky.), 83 F. Supp. 707 (1949); *Whitmyer* v. *Lincoln Parish School Bd.* (D. C.-La.), 75 F. Supp. 686 (1948); *Wrighten* v. *Board of Trustees* (D. C.-S. C.), 72 F. Supp. 948 (1947); *Thompson* v. *Gibbes* (D. C.-S. C.), 60 F. Supp. 872 (1945); *Lopez* v. *Seccombe* (D. C.-Col.), 71 F. Supp. 769 (1944); *Thomas* v. *Hibbitts* (D. C.-Tenn.), 46 F. Supp. 368 (1942). This practice and the authority of district courts to proceed in these cases without prior resort to other remedies, *Carter* v. *School Board* (C. A. 4), 182 F. (2d) 531 (1950); *Burt* v. *City of New York* (C. A. 2), 156 F. (2d) 791, *semble; Thompson* v. *Gibbes, supra;* see *Heard* v. *Ouachita Parish School Board* (D. C.-La.), 94 F. Supp. 897 (1951), is thus firmly established in our jurisprudence.

Several cases brought to enforce the right conferred by Title 8 U. S. C. § 43 pursuant to Title 28 U. S. C. § 1343(3) are presently pending in federal district courts throughout the United States.[5] In several of these cases the defendant state officers have already raised the objection that plaintiffs have failed to exhaust administrative remedies, relying on *Cook* v. *Davis* (C. A. 5), 178 F. (2d) 595 (1949), cert. denied 340 U. S. 811.[6] These cases involve not only complaints of unconstitutional discrimination in the fixing and payment of teachers' salaries but involve cases complaining of unconstitutional discrimination in providing public education. In the latter kind of case, this Court has already rejected the plea that a prior demand must first be

[5] E. g. *Briggs* v. *Elliott,* U. S. D. C., E. D., S. C.; *Aaron* v. *Cook,* U. S. D. C., N. D., Ga.; *Brown* v. *Board of Education of Topeka,* U. S. D. C., First Dist., Kansas; *Roberts* v. *Lowndes,* U. S. D. C., Dist. Md.; *Thomas* v. *Gray,* U. S. D. C., M. D., N. C.; *Heard* v. *Ouachita Parish School Bd.* (U. S. D. C., W. D., La.), 947 F. Supp. 897 (1951).

[6] *Briggs* v. *Elliott, supra,* note 5; *Aaron* v. *Cook, supra,* note 5.

made on state officials before relief can be sought in the courts, *Sipuel* v. *Board of Regents of University of Oklahoma*, 332 U. S. 631 (1948); *Fisher* v. *Hurst*, 333 U. S. 147 (1948).

For the foregoing reasons, and for the reason that the rights which were intended to be granted or secured by the Fourteenth Amendment to the Federal Constitution, for the infringement of which the Congress has provided a right of action, are presently subject to such infringement by persons acting under color of state law in open and express defiance of recent decisions of this Court,[7] this petition should be granted in order to put an end to the uncertainty which now exists with respect to the intent of Congress in enacting Title 8 U. S. C. § 43 and Title 28 U. S. C. § 1343(3) and to the uncertainty for both litigants and federal courts which ensues since *Cook* v. *Davis, supra.*

VIII.

The judgment of the court below is in conflict with the judgment of other circuits, *Carter, et al.* v. *School Board* (C. A. 4), 182 F. (2d) 531 (1950) and *Burt* v. *City of New York* (C. A. 2), 156 F. (2d) 791 (1945), *semble,* cases

[7] In February, 1951, the Georgia Legislature passed a bill authorizing withdrawal of school funds from any white school to which a court might order a Negro admitted. See N. Y. *Times* for February 11, 15, 18, 1951.

On September 28, 1950, the N. Y. *Times* reported that Gov. Herman Talmadge of Georgia had asserted that the United States does not have enough troops or police to enforce a court order for Negro and white students to sit in the same class rooms.

On May 11, 1951, the N. Y. *Times* reported that the legislature of the State of Florida was contemplating legislation similar to that passed by the State of Georgia.

On January 25, 1951, and on March 17 and 19, 1951 the New York *Times* reported that Gov. James Burns of South Carolina threatened action similar to that taken in Georgia and generally threatened to defy anti-segregation rulings.

brought to enforce the right conferred by Title 8 U. S. C. § 43 pursuant to the provisions of Title 28 U. S. C. § 1343(3).

IX.

Even if this Court should decide that the rule requiring exhaustion of administrative remedies is properly invoked in an action in a federal district court to redress the deprivation under color of state law of a right secured by the federal constitution, the State of Mississippi has not provided an administrative remedy which must be exhausted by a teacher complaining of unconstitutional discrimination in the fixing and payment of teachers' salaries since exhaustion of this remedy is not mandatory, cf. *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission,* 328 U. S. 152 (1946); *United States Alkali Export Assn. Inc.* v. *United States,* 325 U. S. 196 (1945), cf. *Levers* v. *Anderson,* 326 U. S. 219 (1945) and *Prendergast* v. *New York,* 262 U. S. 43 (1923), *Moore* v. *Illinois Central Railway,* 312 U. S. 630 (1941), having been so construed by the highest court of the State of Mississippi, *State ex rel. Plunkett* v. *Miller,* 162 Miss. 149 (1931), *Clark, et al.* v. *Board of Trustees,* 117 Miss. 234 (1918), *Moreau* v. *Grandich,* 114 Miss. 560 (1917), *Hobbs* v. *Germany,* 94 Miss. 469 (1909).

In addition, the agencies to which petitioners might have appealed are without the authority or power to remedy the discrimination. The sole power and authority of the county superintendent is to render a decision and give advice in all controversies arising under the school law. Miss. Code (1942) § 6261. The sole power and authority of the State Board is to render a decision on a written statement of facts in appeals from the decisions of the county superintendent or the state superintendent. Miss. Code (1942) § 6234. Neither agency has power to enforce

its decisions. cf. *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 496 (1949); *Hillsborough* v. *Cromwell*, 326 U. S. 620 (1946); *Georgia* v. *Penn. R. R. Co.*, 324 U. S. 439 (1945); *United States Alkali Export Assn., Inc.* v. *United States, supra.*

The judgment of the Court below is thus not in accord with the decisions of this Court in cases where the administrative remedy has been found to be not mandatory and in cases where it was found that the administrative agency lacked the power of remedy.

Conclusion.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit should be granted.

ROBERT L. CARTER,

THURGOOD MARSHALL,
20 West 40th Street,
New York 18, New York,
Attorneys for Petitioners.

JAMES A. BURNS,
CONSTANCE BAKER MOTLEY,
Of Counsel.

Dated: May 15, 1951.

IN THE

Supreme Court of the United States

October Term, 1950

No. .....

GLADYS NOEL BATES and RICHARD JESS BROWN, Individually and on Behalf of the Negro Teachers and Principals in the Jackson Separate School District,
Petitioners,

vs.

JOHN C. BATTE, President; R. M. HEDERMAN, JR., Secretary; R. W. NAEF, W. R. NEWMAN, JR., and W. D. McCAIN, Constituting the Board of Trustees of Jackson Separate School District and K. P. WALKER, Superintendent of Jackson Separate Schools,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Opinion of the Courts Below.

The opinion of the United States Court of Appeals for the Fifth Circuit is found on page 296 of the record in this case. The opinion is officially reported in the advanced opinions of the Federal Reporter, Second Series, *Bates* v.

Batte, 187 F. (2d) 142 (1951). The opinion of the United States District Court for the Southern District of Mississippi may be found on page 245 of the record. That opinion is not officially reported.

Jurisdiction.

The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code, Section 1254. The United States District Court for the Southern District of Mississippi entered a final judgment in this cause dismissing the action for failure to exhaust state administrative remedies on March 22, 1950. That judgment was affirmed by the United States Court of Appeals for the Fifth Circuit on February 15, 1951. This is a case arising under the Constitution and laws of the United States. In this action petitioners have consistently maintained that rights secured to them by the Fourteenth Amendment to the Federal Constitution have been violated.

Statement of the Case.

The Statement of the Case is contained in the Summary Statement of the Matter Involved in the Petition for Writ of Certiorari herein.

Statement of the Facts.

A brief statement of the facts is made in the Petition for Writ of Certiorari and therefore will not be repeated here.

Errors Relied Upon.

The Court below erred in applying the rule of exhaustion of administrative remedies to this case.

The Court below erred in affirming the judgment of dismissal on the ground that state administrative remedies had not been exhausted.

The Court below erred in holding that this case is governed by *Cook* v. *Davis* (C. A. 5), 178 F. (2d) 595 (1949), cert. denied 340 U. S. 811.

ARGUMENT.

I.

The rule of exhaustion of administrative remedies was improperly applied to this case.

A. It was not the intent of Congress that an administrative agency have primary and exclusive jurisdiction.

The rule which requires that administrative remedies be exhausted before invoking the jurisdiction of a federal court is unusually broad in its scope.[1] Its application to varying circumstances[2] has been so wide that it now appears that the rule is not one rule but an unconscious assimilation of several ancillary rules or rules having a similar effect in application.[3] Nevertheless, whenever a

[1] Berger, *Exhaustion of Administrative Remedies,* 48 Yale L. J. 981 (1939).

[2] E. g. *Prentis* v. *Atlantic Coast Line Co.,* 211 U. S. 210 (1908); *United States* v. *Sing Tuck,* 194 U. S. 161 (1904); *First National Bank* v. *Albright,* 208 U. S. 548 (1908); *Pacific Tel. & Tel. Co.* v. *Seattle,* 291 U. S. 300 (1934); *Natural Gas Pipeline Co.* v. *Slattery,* 302 U. S. 300 (1938); *Pusey & Jones Co.* v. *Hanssen,* 261 U. S. 491 (1923); *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41 (1938); *Vandalia Railroad Company* v. *Public Service Commission,* 242 U. S. 255 (1916); *Shannahan* v. *United States,* 303 U. S. 296 (1938).

[3] Davis, *Administrative Law Doctrines of Exhaustion of Remedies, Ripeness for Review, and Primary Jurisdiction,* 28 Texas L. Rev. 168, 376 (1949). Professor Davis intimates that courts have, in applying this rule, assimilated the equity rule of not lending its aid where there was an adequate remedy at law, the rule that a court should not intervene until the matter is ripe for judicial review, the rule of primary jurisdiction.

case has come before this Court which is the subject of Congressional legislation, this Court has looked at the statute passed by the Congress to determine whether the Congress has conferred on an administrative agency primary exclusive jurisdiction to hear and determine certain matters before providing for judicial review. *Securities & Exchange Commission* v. *Otis*, 338 U. S. 843 (1949); *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218 (1947); *Aircraft & D. Equipment Corp.* v. *Hirsch*, 331 U. S. 752 (1947); *Federal Power Commission* v. *Arkansas Power & Light Co.*, 330 U. S. 802 (1947); *Macauley* v. *Waterman Steamship Corp.*, 327 U. S. 540 (1946); *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561 (1946); *Myers* v. *Bethlehem Shipbuilding Corp., supra; United States* v. *Sing Tuck*, 194 U. S. 161 (1904). In other words, this Court must find that the Congress intended that certain matters should be first determined by an administrative tribunal as a prerequisite to the court's jurisdiction. *Armour & Co.* v. *Alton R. R.*, 312 U. S. 195 (1941); *Myers* v. *Bethlehem Shipbuilding Corp., supra; Board of Railroad Com'rs.* v. *Great N. Ry.*, 281 U. S. 412 (1930); *Great N. Ry.* v. *Merchants Elevator Co.*, 259 U. S. 285, 290 (1922); *Robinson* v. *Baltimore & Ohio Railroad*, 222 U. S. 506 (1912); *Texas & P. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1907).

In addition, this Court must find that the administrative agency has been granted the power of remedy and has the authority to act. *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 496 (1949); *Hillsborough* v. *Cromwell*, 326 U. S. 620 (1946); *Georgia* v. *Penn. R. R. Co.*, 324 U. S. 439 (1945); *United States Alkali Export Ass'n, Inc.* v. *United States*, 325 U. S. 196 (1945).

In providing that there shall be a right of redress against every person who, acting under color of state statute, ordinance, regulation, custom or usage, subjects or

causes to be subjected a citizen of the United States, or other persons within the jurisdiction thereof, to the deprivation of any right, privilege, or immunity secured by the Constitution and laws,[4] the Congress of the United States did not confer on an administrative agency primary exclusive jurisdiction to hear and determne certain matters before the matter might be reviewed by the courts. On the contrary, it expressly conferred original jurisdiction in such cases on the district courts of the United States.[5] The reasons for so doing are obvious. The purpose of the legislation was to curb the acts of state officers[6]—including the judiciary, *see, Burt* v. *City of New York* (C. A. 2), 156 F. (2d) 791 (1945). The fact that the southern states had passed discriminatory legislation directed at the ex-slaves and that officials of these states were openly depriving the new citizens of their rights—especially those which the Fourteenth Amendment to the Federal Constitution was designed to protect—and the impossibility of receiving adequate protection within the state from such acts, was placed squarely before the Congress at the time that this legislation was before it for consideration.[7] The Congress therefore conferred original jurisdiction on the federal district courts to hear and determine these cases.[8] Otherwise the very purpose of the legislation would have been defeated.

Title 8 U. S. C. § 43 in and of itself conferred a right. It conferred a right to bring an action. This Court must therefore look at the statutes to see whether the Congress

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[4] Title 8 U. S. C. § 43, Revised Statutes, § 1979.

[5] Title 28 U. S. C. § 1343(3).

[6] Congressional Globe, 42nd Congress, 1871, First Session, Part 1, report on H.R. No. 320, p. 317 and debate pp. 385, 395, 461 and 495, and part 2, Appendix, pp. 86, 113, 209, and 216, 217.

[7] *Ibid.*

[8] *Hague* v. *C. I. O.*, 307 U. S. 496, 508-510 (1939).

intended to confer primary exclusive jurisdiction on an administrative agency, whether state or federal, before bringing such action. In answer to this, the Court will find that at the time that Congress conferred this right it expressly provided that the federal courts should have original jurisdiction in such cases.[9] The jurisdiction of district courts was then as now very limited.[10] The Congress therefore made such action a special exception or a special case for district court jurisdiction. It is therefore clear that the Congress did not intend that a state administrative agency should have primary jurisdiction in these cases.

B. The question to be decided is not one which is within the peculiar competence of an established administrative agency.

The question to be decided in these cases is not one which is peculiarly susceptible of administrative determination.[11] cf. *Slocum* v. *Delaware, Lackawanna & Western R. Co.*, 339 U. S. 239 (1950). This is an action in which the relief sought is a declaratory judgment and injunction (R. 13-14). The question to be decided by the trial court in the instant case, and which was decided by it in favor of these petitioners, is whether there is unconstitutional discrimination in the salary fixing process which must be enjoined as to the future. cf. *Georgia* v. *Penn. R. Co., supra.* This is a question which this Court has held is within the special competence of federal courts. *Shelley* v. *Kramer,* 334 U. S. 1 (1948).

The entire doctrine of exhaustion of administrative remedies is thus inapplicable to this case.

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[9] *Ibid.*

[10] *Ibid.*

[11] Davis, *supra,* note 3 at 402.

C. No jurisdictional prerequisites were prescribed by Congress.

In providing that the district courts of the United States shall have original jurisdiction in such cases, the Congress did not attach thereto the usual jurisdictional prerequisites for invoking the jurisdiction of district courts. *Smith* v. *Allwright,* 321 U. S. 649 (1944); *Douglas* v. *Jeannette,* 319 U. S. 157 (1943); *Hague* v. *C. I. O.,* 307 U. S. 496 (1939); *Bottone* v. *Lindsley* (C. A. 10), 170 F. (2d) 705 (1948); *Glicker* v. *Michigan* (C. A. 6), 160 F. (2d) 96 (1947); *City of Manchester* v. *Leiby* (C. A. 1), 117 F. (2d) 661 (1941). Neither did it provide for preliminary administrative determination of certain matters with subsequent review by the federal district courts. *Carter* v. *School Board* (C. A. 4), 182 F. (2d) 531 (1950); *Burt* v. *City of New York, supra, semble; Thompson* v. *Gibbes* (D. C.-S. C.), 60 F. Supp. 872 (1945); see, *Heard* v. *Ouachita Parish School Board* (D. C.-La.), 94 F. Supp. 897 (1951). By requiring that this action be dismissed and that administrative remedies be exhausted before resorting to a federal district court, the court below prescribed a jurisdictional requirement which has not been decreed by the Congress in a matter about which Congress has legislated and a matter which it has expressly brought within the original jurisdiction of the district courts. When the Congress intends exhaustion of administrative remedies as a jurisdictional prerequisite to invoking the jurisdiction of federal courts, this intention is clearly expressed or it may be readily inferred. *Slocum* v. *Deleware, Lackawanna & Western R. Co.,* 339 U. S. 239 (1950); *Armour & Co.* v. *Alton R. R.,* 312 U. S. 195 (1941); *Board of Railroad Com'rs* v. *Great N. Ry.,* 281 U. S. 412 (1930); *Great N. Ry.* v. *Merchants Elevator Co.,* 259 U. S. 285, 290 (1922); *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41, 52 (1938); *Robinson* v. *Balti-*

more & Ohio Railroad, 222 U. S. 506 (1912); *Texas & P. Ry.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426 (1907).

D. Exhaustion of the state administrative remedies is not mandatory.

The state statutory provisions on which respondents and the courts below relied are set forth in the Appendix to this brief.

The highest court in the State of Mississippi has construed these statutes. That court has consistently held that the remedies provided are not exclusive but alternative, and need not in any case be exhausted before resort to the courts. *State ex rel. Plunkett* v. *Miller,* 162 Miss. 149 (1931); *Clark, et al.* v. *Board of Trustees,* 117 Miss. 234 (1918); *Moreau* v. *Grandich,* 114 Miss. 560 (1917); *Hobbs* v. *Germany,* 94 Miss. 469 (1909).

Whenever this Court has found that exhaustion of the administrative remedy was not mandatory, application of the rule has been denied. *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission,* 328 U. S. 152 (1946); *United States Alkali Export Ass'n, Inc.* v. *United States,* 325 U. S. 196 (1945); *Moore* v. *Illinois Central Railway,* 312 U. S. 630 (1941); cf. *Levers* v. *Anderson,* 326 U. S. 219 (1945) and *Prendergast* v. *New York,* 262 U. S. 43 (1923).

E. The state administrative agencies are without authority and lack the power of remedy.

A reading of the state statutes reveals that the administrative agencies to which petitioners might have appealed, *i. e.,* the county superintendent and the State Board of Education, are without authority or power to decide the question decided by the district court in favor of these petitioners. They are not empowered to decide federal

constitutional law questions. cf. *Hillsborough* v. *Cromwell, supra.* They are empowered to decide only questions of school law. The State Board of Education has only the power to render a decision in an appeal from a decision of the county superintendent or the state superintendent. Miss. Code (1942) § 6234. Decisions rendered by this Board are final, but the Board has not been granted any power to enforce its decisions. cf. *United States Alkali Export Ass'n, Inc.* v. *United States, supra.* The county superintendent has similar limited authority. Miss. Code (1942) § 6261. These agencies are not granted the power to award damages against school officials for unlawful or tortious acts and are not granted power to enjoin unlawful conduct, even when such conduct is violative of the school laws of the state. cf. *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co., supra; Georgia* v. *Penn. R. Co., supra.* The right to bring a tort action is conferred by Title 8 U. S. C. § 43. *Smith* v. *Allwright,* 321 U. S. 649 (1944); *Picking* v. *Penn. R. Co.* (C. A. 3), 151 F. (2d) 240 (1945), as well as the right to bring an action for an injunction, *Hague* v. *C. I. O., supra.*

Georgia v. *Penn. R. R. Co., supra,* presents a case closely analogous to the instant case. In that case, the plaintiff was the State of Georgia. The defendants were some twenty railroad companies. The complaint charged a conspiracy among defendants in restraint of trade and commerce among the states—alleging that defendants had fixed arbitrary and noncompetitive rates and charges for transportation of freight by railroads to and from Georgia so as to prefer the ports of other States over the ports of Georgia. The complaint alleged that Georgia *had no administrative remedy, the I. C. C. having no power to afford relief against such a conspiracy.* The prayer was for damages and for injunctive relief.

Defendants, in their return to the rule to show cause why Georgia should not be permitted to file its bill of complaint, alleged failure to state a cause of action because no prior resort to I. C. C.

The Court held:

(1) "This is a suit in which Georgia asserts claims arising out of Federal laws—the gravamen of which run far beyond the claim of damage to individual shippers (452).

(2) "Georgia does not seek in this action to enjoin any tariff or to have any tariff provision cancelled. She merely asks that the alleged rate-fixing combination and conspiracy among the defendant-carriers be enjoined. As we shall see, that is a matter over which the Commission has no jurisdiction (455). Congress has not given the Commission * * * authority to remove rate-fixing combinations from the prohibitions contained in the anti-trust laws (456). It has not placed these combinations under the control and supervision of the Commission. Nor has it empowered the Commission to proceed against such combinations and through cease and desist orders or otherwise to put an end to their activities.

(3) "The present bill does not seek to have the Court act in the place of the Commission. It seeks to remove from the field of rate-making the influence of a combination which exceeds the limits of the collaboration authorized for the fixing of joint through rates (459). It seeks to put an end to discriminatory and coercive practices. The aim is to make it possible for individual carriers to perform their duty under the Act, so that whatever tariffs may be continued in effect or superseded by new ones may be tariffs which are free

from the restrictive, discriminatory, and coercive influences of the combination. That is not to undercut or impair the primary jurisdiction of the Commisson over rates. It is to free the rate-making function of the influences of a conspiracy over which the Commission has no authority but which if proven to exist can only hinder the Commission in the tasks with which it is confronted (460).

"What we have said disposes for the most part of the argument that recognized principles of equity prevent us from granting the relief which is asked (460).

(4) "Georgia alleges, 'No administrative proceeding directed against a particular schedule of rates would afford relief to the State of Georgia so long as the defendants remain free to promulgate rates by collusive agreement. Until the conspiracy is ended, the corrosion of new schedules, established by the collusive power of the defendant carriers acting in concert would frustrate any action sought to be taken by administrative process to redress the grievances from which the State of Georgia suffers.' Rate-making is a continuous process. Georgia is seeking a decree which will prevent in the future the kind of harmful conduct which has occurred in the past. Take the case of coercion. If it is shown that the alleged combination exists and uses coercion in the fixing of joint through rates, only an injunction aimed at future conduct of that character can give adequate relief. Indeed, so long as the collaboration which exists exceeds lawful limits and continues in operation, the only effective remedy lies in dissolving the combination or in confining it within legitimate boundaries. Any decree which is entered would look to the future and would free tomorrow's

rate-making from the coercive and collusive influence alleged to exist. It cannot of course be determined in advance what rates may be lawfully established. But coercion can be enjoined. And so can a combination which has as its purpose an invidious discrimination against a region or locality (461-462).

"* * * There is no administrative control over the combination. And no adequate or effective remedy other than this suit is suggested which Georgia can employ to eliminate from rate-making the influences of the unlawful conspiracy alleged to exist here" (462).

In this case, the petitioners do not deny the power of the respondent Board of Trustees to fix teachers' salaries. The trial court found that exclusive power to fix teachers' salaries in the Jackson Separate School District is vested in respondent Board of Trustees (R. 249, 250). As in the case of *Georgia* v. *Penn. R. Co., supra,* the petitioners do not seek to substitute the court for the Board of Trustees. What they seek is to have unconstitutional discrimination eliminated from the salary fixing process in the future. *Alston* v. *School Board* (C. A. 4), 112 F. (2d) 992 (1940), cert. denied 311 U. S. 693. The State Board in this case could not enjoin future discrimination. Its only function is to render an opinion on a written statement of facts. At best it has only the power to recommend. In the words of this Court in *United States Alkali Export Ass'n* v. *United States, supra,* at 210: "It can give no remedy. It can make no controlling findings of law or fact. Its recommendations need not be followed by any court or administrative or executive officer."

II.

This case is not governed by *Cook* v. *Davis* (C. A. 5), 178 F. (2d) 595 (1949), cert. denied 340 U. S. 811.

A. The material facts in the *Cook* case.

As pointed out in the petition for writ of certiorari herein, the facts in this case are materially different from the controlling facts in the *Cook* case. The crucial fact in the *Cook* case was the role played by the State Board. There the State Board, unlike the State Board in the instant case, had the power to fix teachers' salaries, determine the number of teachers to be employed by a local board, and to classify all teachers. The local board was compelled to pay the teachers employed by it the minimum salary fixed in the State schedule and with the money paid to it for that purpose by the State Board. The State Board in that case had two schedules, one for Negro teachers and one for white teachers. The schedule adopted by said Board for Negro teachers had uniformly lower rates of pay than the schedule adopted for white teachers.

The local board could supplement the salaries fixed by the State Board. This was done by the local board in adopting a new salary schedule after the suit was instituted in that case. The new schedule was one of the most complicated teacher salary schedules ever devised. It established four categories of teachers. In each category there were three to four so-called "Tracks". On each "Track" there were sixteen to nineteen steps. The system could not even be explained with sufficient clarity by those who devised it. Despite this, however, the new schedule, in the opinion of the court below, was free of the unconstitutional discrimination which previously existed under a supplementary dual schedule. The court below was therefore of

the opinion that the discrimination which existed at the time the district court issued its decree resulted from the discrimination by the State Board which was not a party to the proceeding.

After the new schedule was adopted in the *Cook* case, a procedure was instituted whereby a teacher aggrieved by the action of the Superintendent in placing such teacher on a particular "Track" could appeal to the local board and then to the State Board. This procedure had specific reference to grievances concerning the new schedule. The plaintiff in the *Cook* case had been placed on a "Track" by the superintendent. He did not allege that he was aggrieved thereby, nor did he appeal to the local board or the State Board. It therefore appeared that that particular plaintiff had no cause to complain. And since the remaining general discrimination against the other members of the class which the plaintiff represented resulted from the action of the State Board, the court below was of the opinion that the district court should retain jurisdiction until the State Board had been asked to cease its discriminatory practice or until the State Board would be brought in as a party defendant for refusing to do so.

B. The material facts in the instant case.

In this case, the State Board of Education gives to the local board a sum determined on a per capita basis. Miss. Code (1942) § 6219. This applies also to the appropriations made in 1950 to help equalize Negro teachers' salaries (Appendix, pp. 84-90). Once this amount has been transmitted, the State Board has no authority to say what portion shall be paid in salaries. The State Board, with respect to the respondent Board, has no power with respect to the teacher salary scale and had no salary schedule of its own applicable to the Separate School District involved in this suit. The

exclusive power to determine teachers' salaries is vested in the respondent local board and the trial court so found (R. 249).

The statutes on which respondents rely are, by their own terms, inapplicable. The appeal to the State Board, Miss. Code (1942) § 6234, is from the decision of the county superintendent or the state superintendent. The county superintendent, however, has no control over the school matters of a separate school district, such districts being autonomous, especially with respect to the teachers it employs and the salaries fixed. Miss. Code (1942) § 6423. Therefore, the provision relating to appeals to the county superintendent would not be available to petitioners. Miss. Code (1942) § 6261. The provision relating to the advise of the state superintendent may be invoked only by the county superintendent. Miss. Code § 6240-07. And, unlike the *Cook* case, there is no appeal procedure which is specifically applicable to teacher salary disputes.

After this suit was instituted, the respondent local board did not adopt a new salary schedule. The salary schedule which was then in existence was a very simple one in operation. A stipulated salary was usually recommended by the respondent Superintendent of Schools along with his general recommendation to the respondent board. Both recommendations were generally approved by the respondent board (R. 250).

When a teacher was dissatisfied with the salary recommended by the Superintendent or approved by the board, there was no appeal procedure which was specifically applicable to teacher salary grievances. The reason for this was, undoubtedly, that the decision of the board was final. A teacher who felt that the salary offered was insufficient could decline to enter into the contract.

Before commencing the instant suit, petitioner Gladys Noel Bates, petitioned the respondent board on behalf of herself and all other Negro teachers and principals in the Jackson Separate School District who were similarly situated (R. 89). In reply, the respondent board said that no such discrimination existed. An appeal was therefore taken to the only administrative agency which had jurisdiction with respect to the salaries of teachers in the Jackson Separate School District. And since the action of this board is final, petitioner could only resort to a court for relief. Petitioner chose to resort to the federal district court to enforce the right conferred on her by Title 8 U. S. C. § 43 inasmuch as her complaint was not one limited to her individual salary, but a complaint of unconstitutional discrimination against a class of teachers of which she was a member. The right to bring an action to enjoin such discrimination initially in a federal district court is specifically and unequivocally provided by Title 28 U. S. C. § 1343(3).

In affirming the judgment of dismissal, the court below did not direct the district court to retain jurisdiction as was done in the *Cook* case, until the alleged administrative remedy had been exhausted, thus indicating that the district court was without jurisdiction until the so-called administrative remedies had been exhausted.

The *Cook* case, contrary to the decision of the court below, is not "dispositive" of this case, the material and controlling facts being substantially different.

Conclusion.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the court below should be granted.

ROBERT L. CARTER,

THURGOOD MARSHALL,
20 West 40th Street,
New York 18, New York,
Attorneys for Petitioners.

JAMES A. BURNS,
CONSTANCE BAKER MOTLEY,
Of Counsel.

Dated: May 15, 1951.

APPENDIX

Mississippi Code, 1942

and

1948 Supplement

§ 6217. Curriculum.—(a) The common free schools shall consist of a grammar school of eight grades, viz: First to eighth grades inclusive. The curriculum of the common free school shall consist of: Spelling, reading, arithmetic, geography, English grammar, composition, literature, United States history, history of Mississippi, elements of agriculture, civil government with special reference to local and State government, physiology and hygiene with special reference to the effect of alcohol and narcotics on the human system, home and community sanitation, general science and elementary algebra, and such other subjects as may be added by the State Board of Education.

(b) The public high school shall consist of a high school of four grades, viz: Ninth to twelfth grades, inclusive. The curriculum of the public high schools shall consist of: Mathematics, English, history and social science, pure and applied science, including agriculture, home economics and manual arts, safety on the highways, and such other subjects as may be added by the State Board of Education.

SOURCES: Laws, 1930, ch. 278; 1936, 2nd Ex. ch. 2; 1938, ch. 238.

§ 6218. Scholastic year.—The scholastic year shall be the same as the State fiscal year as is fixed by the amendment to Section 115 of the Constitution of 1890, and shall begin on the first day of July and end on the thirtieth day of June of each year.

SOURCES: Laws, 1930, ch. 278; 1936, 2nd Ex. ch. 2; 1938, ch. 238.

§ 6219. Common school fund.—(a) It shall be the imperative duty of the legislature to appropriate a State common school fund to be taken from the general fund in the State Treasury, which, together with the poll tax collected by and retained in each county, and an ad valorem tax levied by each county or separate school district, shall be sufficient to maintain the common free schools as defined herein for a term of not less than four months in each scholastic year. The common school fund so appropriated shall be distributed among the several counties and separate school districts in proportion to the number of educable children in each, to be determined as is now or may hereafter be provided by law.

(b) The legislature shall appropriate from the general funds in the State Treasury additional funds to be known as "an equalizing fund," and such fund shall be used for equalizing the educational advantages of the different counties by maintaining public high schools, and for the extension of common free schools beyond the four months' term hereinbefore provided for, said funds to be distributed to the various counties and school districts as is now or may hereafter be provided for by law.

(c) The counties outside the separate school district, the separate school districts, and other school districts, may levy a tax as is now or may hereafter be provided for by law, for the purpose of maintaining the public high schools, for extending the term of the common free schools beyond the four months herein provided for, and for other school expenses not provided for by State appropriations.

§ 6232-11. State aid for construction of school buildings —application to state building commission.—Any county consolidated school district, special consolidated school district, municipal separate school district, rural separate school district, or other school districts, desiring to obtain state aid for the construction of school buildings out of funds appropriated therefor by the legislature, shall file written application with the state building commission for an allocation of grant of state funds to be used in helping to defray the cost of constructing such school buildings. Such application shall be made upon forms approved by the state building commission, and shall contain accurate information concerning the needs for such additional buildings or facilities, the type of building or buildings to be constructed, the school area to be served by such new buildings, the location of the school house or school houses in the area to be served, and adjoining areas, the uses to be made of the buildings to be erected and the total cost of the buildings to be erected, and the amount of local funds to be provided for the construction of such building or buildings. Upon the filing of such application, it shall be the duty of the state building commission to refer the same to the state department of education for examination and investigation of the need for the construction of such building or buildings. The state department of education shall thereupon cause a survey to be made of the school building facilities in the area to be served by such new building or buildings, for the purpose of determining whether such building program should be carried out. Such survey shall include a careful study of the school district organization in the area to be served, the location of the school house or school houses, the need for the additional building facilities, and the utilitarian value of such additional building facilities in reducing the cost

and improving the efficiency of the public school system in the area to be affected. And the state department of education shall file its written report with the state building commission, with recommendations as to the need for the construction of such new building or buildings, the type of building or buildings which should be provided and the estimated cost of same. [Amends Laws 1946, ch. 250, § 1.]

SOURCES: Laws, 1946, ch. 250, § 1; 1948, ch. 301, § 1.

§ 6232-12. Grant of funds.—The state building commission, after receiving the report from the state department of education as to the need for the construction of such school building or buildings, may require such additional information as the commission may desire as to the long-term need for such additional school buildings and facilities, and as to the manner in which the county's or district's part of the construction funds is to be provided. If it shall then appear to the state building commission that the proposed new buildings are needed, and that said buildings will be useful in serving the long-term needs of the county, or school district, as the case may be, the state building commission shall be authorized to grant funds to such county or district, to aid in the construction of such school building or buildings. The amount of such state aid shall in no case exceed the sum of two thousand dollars for each class room to be provided in such new building or buildings; and in no event shall the amount of such state aid exceed fifty per-cent of the total cost of such school building or buildings.

The state building commission shall be authorized to grant funds under the provisions of this act to aid in the construction of new buildings or for the construction of additions to buildings which have already been constructed.

SOURCES: Laws, 1946, ch. 250, § 2.

§ 6232-13. Allocation and disbursement of funds.—The funds thus allocated by the state building commission to any county or school district shall be paid in to the county depository, and shall be used and expended by the county school board of the county, in case such funds are allocated to the county, or by the board of trustees of the school district, in case such funds are allocated to a school district, and shall be paid out upon certificates issued by the county superintendent of education, upon orders of the county school board, or the board of trustees of such school district, as the case may be. In case such grant be made to a municipal separate school district such fund shall be paid into the municipal separate school district depository, and shall be paid out upon the order of the board of trustees of such municipal separate school district.

SOURCES: Laws, 1946, ch. 250, § 3.

§ 6232-14. Regulation of expenditures—approval of plans and specifications.—The state building commission is hereby authorized to prescribe such reasonable rules and regulations as the state building commission may deem proper to safeguard the expenditure of funds granted to counties and school districts for the construction of school buildings under the provisions of this act. The state building commission shall be authorized, if the commission shall deem the same necessary, to require that the county's part or the district's part of the construction funds required to complete the construction of such school buildings be made actually available before ordering the payment of the state's part of such funds into the county or district depository. And the state building commission shall be authorized to require that plans and specifications for the construction of any such school building shall be submitted to and ap-

proved by the state building commission before contracts are let for the construction of same.

SOURCES: Laws, 1946, ch. 250, § 4.

§ 6232-15. Purpose of Act.—It is hereby declared to be the purpose and intention of this act to provide a program of state aid for the construction of school buildings in areas where the existing school facilities are inadequate to meet the needs of the school children, and to promote the consolidation of high school facilities, so that better educational opportunities may be provided for high school children at reasonable expense.

SOURCES: Laws, 1946, ch. 250, § 5.

§ 6234. To decide appeals.—The board of education shall decide all appeals from the decisions of the county superintendents, or from the decisions of the state superintendent; but all matters relating to appeals shall be presented in writing, and the decision of the board shall be final.

SOURCES: Codes, 1930, § 6549; Laws, 1924, ch. 283; 1930, ch. 278.

§ 6235. To remove county superintendents in certain cases.—For continued neglect of duty, drunkenness, incompetency or official misconduct, the state board of education may remove a county superintendent; but before the removal, the officer shall have ten days' notice of the charge, and be allowed opportunity to make defense. The members of the board are authorized to administer oaths and to take or cause depositions to be taken, and have the powers of a court to compel witnesses to attend and testify in all matters of investigation by the board.

SOURCES: Codes, 1930, § 6550; Laws, 1924, ch. 283; 1930, ch. 278.

§ 6236. Disburse equalizing fund.—In addition to the regular per capita appropriation for common schools the legislature shall provide an equalizing fund, which shall be disbursed by the state board of education in such manner as may be provided by the legislature of the state of Mississippi.

Sources: Codes, 1930, § 6551; Laws, 1924, ch. 283; 1930, ch. 278.

§ 6237. To audit claims.—The board of education shall audit all claims against the common school fund, and allow so much as may be justly due, not to exceed the amount allowed by law. The board shall have authority, and it shall be their duty, to hear and pass upon all appeals by trustees of public schools from the decision of the county superintendent of education, as to the amount of money that shall be allowed for the payment of teachers' salaries and other expenses allowed by law to any county public school, not a separate school district, from the funds received by the county from the county school fund, from the state common school fund and from county levies for the public schools. All appeals shall be made in writing and the decision of the board shall be final.

Sources: Codes, 1930, § 6552; Laws, 1924, ch. 283; 1930, ch. 278.

§ 6238. Course of study—administration.—The Board of Education shall adopt a course of study to be used in the public schools of the state and shall regulate all matters arising in the practical administration of the school system, not otherwise provided for.

Sources: Codes, 1930, § 6553; Laws, 1924, ch. 283· 1930, ch. 278.

Appendix

ARTICLE 3

[New] State Department of Education

§§ 6245-6248. Repealed.—Laws 1946, ch. 297, infra, § 6245-14.

§ 6245-01. State department of education—organization.—There shall be a state department of education, which shall consist of a state superintendent of education, an assistant state superintendent of education, a director of the division of finance and administration, a director of the division of instruction, a director of the division of school building and transportation services, a director of the division of vocational education, a director of the division of vocational rehabilitation, a director of the division of crippled children, and such supervisors, assistants, or employees as may be necessary for the proper functioning of the above-named divisions.

Sources: Laws, 1946, ch. 297, § 1.

§ 6245-02. Administration.—The state department of education is hereby charged with the execution of all laws relating to the administrative, supervisory and consultative services to the public schools, agricultural high schools, and junior colleges of the state of Mississippi. The offices of the state department of education shall be in the city of Jackson, Mississippi, and the secretary of state shall provide suitable quarters therefor. Subject to the direction of the state board of education as provided by law, the administration, management and control of the department is hereby vested in the superintendent of public education, who shall be directly responsible for the rightful functioning thereof.

Sources: Laws, 1946, ch. 297, § 2.

§ 6245-03. State superintendent—term of office—bond.—The state superintendent of public education shall be elected for a term of four (4) years at the same time and in the same manner as the governor is elected. He shall remain in office until his successor shall be elected and qualified, and shall be responsible for the general supervision of the common schools and educational interests of the state, and he shall perform such other duties as shall be prescribed by law. He shall give bond in the penalty of twenty-five thousand dollars ($25,000.00), with sureties to be approved by the governor, conditioned according to law; and said bond when approved shall be filed and recorded in the office of the secretary of state. [Supersedes § 6245, Code of 1942.]

SOURCES: Code, 1942, § 6245; Laws, 1946, ch. 297, § 3.

§ 6245-04. Assistant superintendent, directors and employees.—The assistant state superintendent of public education, the directors, supervisors, clerical assistants, and employees shall be selected by, and hold office subject to, the will of the state superintendent, except as provided in section 6 [§ 6245-06] of this act. The assistant state superintendent may be authorized to act in the absence or disability of the state superintendent and shall perform such other duties as may be assigned to him by the state superintendent. The state superintendent shall have the power to assign to any division such clerical help as he may deem necessary and to discharge such clerical help among the divisions at any time necessity requires, except as provided in section 6 [§ 6245-06] of this act.

SOURCES: Laws, 1946, ch. 297, § 4.

§ 6245-05. Salaries and expenses.—The state superintendent, assistant state superintendent, and the director

of each division, except the directors provided for in section 6 [§ 6245-06] of this act, shall receive such salary as shall be fixed by the legislature. The state superintendent shall fix the amount of compensation of all supervisors, clerical assistants, or employees of the state department of education and the traveling expenses or other expenses of any of the personnel of the department, except as provided for in section 6 [§ 6245-06] of this act. All such salaries, compensation or expenses shall be paid upon the requisition of the state superintendent of public education and warrant issued thereunder by the state auditor out of funds appropriated by the legislature in a lump sum upon the basis of budgetary requirements submitted by the superintendent of education or out of funds otherwise made available. The entire expense of administering the department shall never exceed the amount appropriated therefor plus funds received from sources other than state appropriations and for a violation of this provision, the superintendent shall be liable and he and the sureties on his bond shall be required to restore any such excess.

SOURCES: Laws, 1946, ch. 297, § 5.

§ 6245-07. Duties of superintendent.—The superintendent of public education shall have the power and it shall be his duty:

1. To supervise in the manner herein provided the public free schools, agricultural high schools, and junior colleges of the state and to prescribe such rules and regulations for the efficient organization and conduct of same, as he may deem necessary.

2. To preside over all meetings of the state board of education.

3. To collect data for determining the proper distribution of the state common school funds.

4. To have bound and preserved in his office, as the property of the state, all such school documents from other states and governments, books, or pamphlets on educational subjects, school books, apparatus, maps, charts, and the like, as shall be or have been purchased or donated for the use of his office.

5. To keep a complete record of all his official acts and the acts of the state board of education.

6. To prepare, have printed, and furnish all officers charged with the administration of the laws pertaining to the public schools, such blank forms and books as may be necessary to the proper discharge of their duties, and all of this printing shall be paid for out of funds provided by the legislature.

7. To have printed in pamphlet form the laws pertaining to the public schools and publish therein forms for conducting school business, the rules and regulations for the government of schools, that he, or the board of education may recommend and such other matters as may be deemed worthy of public interest pertaining to the public schools, and all of this printing shall be paid for out of funds provided by the legislature.

8. To meet the county superintendents annually at such time and place as he shall appoint, for the purpose of accumulating facts relative to schools, to review the educational progress made in the various sections of the state, to compare views, discuss problems, hear discussions and suggestions relative to examinations and qualifications of

teachers, methods of instruction, text books, summer schools for teachers, visitation of schools, consolidation of schools, health work in the schools, vocational education, and other matters pertaining to the public school system.

9. To advise the county superintendents upon all matters involving the welfare of the schools, and at the request of any county superintendent to give his opinion upon a written statement of facts on all questions and controversies arising out of the interpretation and construction of the school laws, in regard to rights, powers and duties of school officers and county superintendents, and to keep a record of all such decisions. Before giving any opinion, the superintendent may submit the statement of facts to the attorney general for his advice thereon, and it shall be the duty of the attorney general forthwith to examine such statement, and suggest the proper decision to be made upon such facts.

10. To require annually, and as often as he may deem proper, of county superintendents, detailed reports on the educational business of the various counties.

11. To make reports, concerning agricultural high schools and serve on various committees and boards as provided by law.

12. On or before the tenth day of January in each year in which the legislature meets in regular sessions, to prepare, and have printed a biennial report to the legislature showing:

(a) The receipts and disbursements of all school funds officially handled by him;

(b) The number of school districts, school teachers employed, the number of pupils taught therein, and the attendance of pupils.

(c) County and district levies for common schools, high schools, agricultural high schools, consolidated schools, and junior colleges;

(d) The conditions of vocational education in the state of Mississippi, a list of schools to which federal and state aid has been given, and a detailed statement of the expenditures of federal funds and the state funds that may be provided.

(e) Such general matters, information, and recommendations as relate in his opinion, to the educational interests of the state.

13. To perform such other duties in the administration of the public schools as may be required by law. [Supersedes § 6247, Code of 1942.]

SOURCES: Code, 1942, § 6247; Laws, 1946, ch. 297, § 7.

§ 6245-08. Duties of division directors.—(a) The director of the division of administration and finance shall have charge of and be responsible for, (1) the apportionment of state funds as directed by the state board of education; (2) budgetary control; (3) educational and financial records, reports and research; (4) fiscal and business management; and (5) departmental bookkeeping.

(b) The director of the division of instruction shall have charge of and be responsible for the supervision of, (1) teacher training, certification and placement; (2) elementary education; (3) secondary education; (4) junior colleges and agricultural high schools; (5) health education, includ-

ing instruction concerning the effects of intoxicating alcoholic beverages on the physical well-being and moral character of the people; (6) audio-visual education; (7) music education; (8) negro education and teacher training placement; and (9) curriculum services.

The director of the division of instruction shall take the place of the director and executive secretary of teacher certification provided for in chapter 157, laws of Mississippi, 1944 [§§ 6249-6251], and shall have charge of and be responsible for the program of teacher certification provided for in said act, and shall be responsible for the proper administration of said act, including collection of fees for certification provided for in said act; and any provisions of said act to the contrary are hereby repealed.

The director of the division of instruction shall take the place of the supervisor of alcohol and narcotics teaching provided for in chapter 166, laws of Mississippi, 1938 [§§ 6685-6688, Code of 1942], and shall have charge of and be responsible for the supervision of the program of alcohol and narcotics teaching provided for in said act, and shall be responsible for the proper administration of said act; and any provisions of said act to the contrary are hereby repealed.

(c) The director of the division of school building and transportation services shall have charge of and be responsible for, (1) school plant planning and construction; (2) school building inspection services, and (3) school transportation services.

(d) The director of the division of vocational education shall have charge of and be responsible for vocational education training in (1) agriculture; (2) home economics;

(3) trades and industry; (4) distributive education; (5) adult education; and (6) teacher training and supervision.

(e) The director of the division of vocational rehabilitation shall have charge of and be responsible for the vocational rehabilitation of crippled adults.

(f) The director of the division of crippled children's services shall have charge of and be responsible for the physical restoration of crippled children. [Amends Laws 1946, ch. 297, § 8.]

SOURCES: Laws, 1946, ch. 297; § 8; 1948, ch. 294, § 1.

§ 6258. Shall keep records.—The county superintendent shall keep a record of all his official acts, in the manner and form prescribed by law, and conform the manner of its keeping to the recommendations and directions of the state superintendent of education.

SOURCES: Codes, 1930, § 6569; Laws, 1924, ch. 283; 1930, ch. 278.

§ 6259. Duties generally.—It shall be the duty of the county superintendents:

(1) To employ for each school under his supervision, such teacher or teachers, as may be recommended by the local trustees, provided such teacher or teachers shall be recommended on or before June 15th of each year; but the teacher shall hold his certificate of proper date and grade, to execute the required contract.

(2) To allow assistant teachers as specified by law.

(3) To fix salaries of teachers and to make contracts with them except as otherwise specified by law.

(4) To enforce the course of study adopted by the board of education, and the uniform textbooks adopted for the county.

(5) To enforce the law and rules and regulations in reference to the examination of teachers.

(6) To administer oaths in all cases of teachers, trustees, and others relating to the schools, and to take testimony in appeal cases under the school law.

(7) To examine the monthly reports of teachers and require the signatures of a majority of the trustees certifying to the accuracy of the report, and upon the report thus certified, to issue a pay certificate showing the amount of salary due, and the scholastic month for which it is issued. The pay certificate must be in the form prescribed by the board of education, and a stub duplicate made out and preserved in his office.

(8) To carefully preserve all reports of school officers and teachers, and when he resigns, vacates, is removed, or goes out of office, within ten days thereafter, to deliver to his successor or to the clerk of the chancery court for him, all money, property, books, effects, or papers remaining in his hands.

(9) To make annually, on or before the first day of August, a written report to the board of supervisors and mayor and board of aldermen of the municipality constituting a separate school district, showing names, sex and color of the teachers employed during the preceding scholastic year, the number of months taught by each, and the aggregate amounts of pay certificates issued to each and all. The report shall be filed in the office of the chancery clerk or the

municipal clerk, as the case may be, and be compared by said officer with the pay certificates of the county superintendent for the period embraced in the report.

(10) To file with the chancery and municipal clerk, before issuing any pay certificates for the current term, lists of the teachers employer, and the monthly salary of each, as shown by the contract, and to add to the list any teachers subsequently employed.

(11) To keep in his office and carefully preserve the public school record provided; to enter therein the proceedings of the county school board, the decisions of appeal cases, and other official acts; a list of the teachers examined, licensed and employed; and within ten days after they are rendered, to record the data required from the monthly and term reports of teachers, and the annual reports of the county and separate school district treasurers; and from the summaries of records thus kept to render on or before the first of September, an annual report to the state superintendent in the form and containing the particulars required. If a county superintendent fails to make report to the state superintendent by the fifteenth day of September, he shall forfeit fifty dollars out of his salary; and the board of supervisors, upon receiving from the state superintendent of education notice of such failure, must deduct the amount forfeited from his salary.

(12) To prepare on township blanks, an outline map, showing the number of the sections embraced in each school district, and to paste the same in the school register for the district before delivering it to the teacher thereof.

(13) To make a record of the names of trustees, showing the districts in which they were elected, and the post office

of each. He shall in due time deliver to the trustees or teachers of each district, such blanks as they will need for the coming school year; and give them such information with regard to their duties as may be required. He shall address all official correspondence to the trustees. Notice to them shall be regarded as notice to the people of the district, and it shall be the duty of the trustees to notify the people.

(14) To make to the board of supervisors and mayor and board of aldermen or other governing body of a municipality constituting a separate school district, reports for each scholastic month, which shall show the amount of pay certicates issued for that month, together with statement showing the schools visited, date of visitation, and time he spent in each school during his visit. It shall be unlawful to allow the salary of the superintendent until said report be on file.

(15) To distribute promptly all reports, laws, forms, circulars, and instructions which he may receive for the use of school officers and teachers, from the state superintendent of public education.

(16) To keep on file and preserve in his office the biennial report of the state superintendent of public education, and all circular letters sent out by him and a copy of the school law.

(17) To visit the schools and require teachers to perform all their duties. On his first visit, he shall, in the county schools, correct any deficiencies which may exist in the classification of the pupils or the government of the schools; and in the separate school districts he shall call the attention of the trustees to such deficiencies for correction by

them. He shall note down the condition and value of the buildings and lot and of the furniture, the methods of instruction, the branches taught, and his estimate of the ability of the teacher to conduct the school. He shall give such direction and make such recommendation as he deems expedient and needful to secure the best results in the instruction of the pupils, and shall examine the classes to see that thorough work is done. He shall urge patrons to provide their children with comfortable and well furnished schoolhouses. For every school not so visited, the board of supervisors, must, on proof thereof, deduct ten dollars from his salary unless the superintendent be excused for cause.

(18) To call meetings of the county school board as prescribed by law.

(19) To call annually on the first Friday in May a meeting of the trustees of the county for the election of the county school board and for the purpose of discussing with them ways and means of conducting the schools of the county.

(20) To observe such instructions and regulations as the state board of education may, from time to time, prescribe, and to make special reports to these officials, whenever required.

(21) To be at the county seat on Saturdays of each scholastic month of the term to receive monthly reports, issue pay certificates, and attend to other official duties. If absent, without leave previously granted by the board of supervisors, the board shall deduct from his salary ten dollars for each day's absence, unless prevented by illness or other unavoidable cause. And when there are two judicial districts in his county, the superintendent shall alternate, going to the courthouse of the districts alternately.

(22) To make an enumeration of the educable children in his county every two years as prescribed by law.

(23) To perform such other duties as may be required of him by law or by rules and regulations of the state board of education. In no case shall he receipt for a teacher's warrant or collect money on the same.

(24) At the end of each scholastic year make a report to the department of education of all moneys spent in the county for public education, including the expenses in municipalities, so as to ascertain the amount spent on each school child in the state.

SOURCES: Codes, 1930, § 6570; Laws, 1924, ch. 283; 1930, ch. 278.

§ 6260. Monthly salaries to be proportionate to the whole school fund.—Superintendents shall fix the salaries of teachers so that the amount to be paid in salaries and other expenses for maintaining all the schools for one month shall not exceed that fractional part of the whole school fund which one month is of the whole number of months the schools are taught.

SOURCES: Codes, 1930, § 6571; Laws, 1924, ch. 283; 1930, ch. 278.

§ 6261. To settle disputes in schools.—In all controversies arising under the school law, the opinion and advice of the county superintendent shall first be sought. From his decision an appeal may be taken to the state board of education upon a written statement of the facts, certified by the county superintendent or by the secretary of the board of trustees.

SOURCES: Codes, 1930, § 6572; Laws, 1924, ch. 283; 1930, ch. 278.

§ 6262. May suspend or remove teacher or trustee and fill vacancies.—For incompetency, neglect of duty, immoral conduct, or other disqualifications, the county superintendent may suspend or remove any teacher or trustee from office in any school district. For the purpose of conducting inquiries and trials, the superintendent has the same power as a justice of the peace to issue subpoenas for witnesses and to compel their attendance and the giving of evidence by them. Appeals may be had as provided in the following section on revoking teachers' license. When from such cause, or from death, resignation, or other cause, a vacancy in either of the above named offices occurs, it shall be the duty of the county superintendent, within ten days after the vacancy occurs, or as soon thereafter as is practicable, to supply the same by appointment.

Sources: Codes, 1930, § 6573; Laws, 1924, ch. 283; 1930, ch. 278.

§ 6263. May revoke teacher's license.—For intemperance, immoral conduct, brutal treatment of a pupil, or other good cause, the county superintendent may revoke the license, state or county, of a teacher; but the teacher or those opposed to the teacher shall be allowed an appeal to the state board of education, to whom statements, under oath, of the acts may be made by the county superintendent and other interested parties. The teachers must be notified of the charges ten days before the trial, by the county superintendent.

Sources: Codes, 1930, § 6574; Laws, 1924, ch. 283; 1930, ch. 278.

§ 6264.5. Special report as to teachers.—Within fifteen (15) days after the close of the first month of school each

year, each county school superintendent and each separate district school superintendent shall file with the director of administration and finance in the department of education a special report, showing for each school in the county or separate district the name of the school, the name, sex, training, experience, salary and any other information deemed necessary by the state board of education, of each teacher in the school. These special reports shall be submitted on forms prepared and furnished by the state board of education. [Effective from and after July 1, 1948.]

Sources: Laws, 1948, ch. 292, § 1.

§ 6281. Rules, etc.—The State Board of Education is hereby authorized and empowered to set up rules and regulations for the issuance of the certificates provided for in this Act and such other certificates as may be required, and to administer said rules and regulations through the State Board of Examiners, which latter Board shall perform such duties in connection therewith as the State Board of Education may require, but said rules and regulations shall not be changed without giving a minimum notice of one year.

The State Board of Education is hereby authorized and empowered to arrange for the examination of applicants to teach in any county when so requested by the county superintendent of education, said examination to include all of the subjects in the common school curriculum. The examination questions shall be properly adjusted to the kind and grade of certificate applied for. One teacher, but not more than two teachers, shall conduct said examination, each to receive five ($5.00) dollars for each day of actual service in holding the examination and twenty-five cents additional for grading the papers of each applicant, to be paid out of

the county school fund in the same manner as teachers' salaries are paid.

The State Board of Examiners is authorized to grant teachers' professional certificate of the highest grade to graduates of the University of Mississippi, Mississippi State College, the Mississippi State College for Women, the State Teachers' College, the Delta State Teachers' College, the Alcorn A. & M. College, and such other institutions of higher learning in this State as may maintain a standard four-year college course, approved by the State Board of Education; provided, that certificate shall be issued only to such graduates of the different institutions as have successfully passed nine session hours of college work in education designated and approved by the State Board of Education.

SOURCES: Laws, 1938, Ex. ch. 44.

§ 6282. Outstanding licenses.—No license or certificate to teach in the public schools of the State which is valid at the time this Act takes effect shall be invalidated by the passage of this Act, but all such licenses and certificates shall remain valid and in effect during the time and for the purpose for which they were originally issued.

SOURCES: Laws, 1938, Ex. ch. 44.

TEACHERS' SALARIES

§ 6283. Contracts with teachers.—It shall be the duty of the superintendent to make a contract in the form prescribed by the board of education with every licensed teacher who has been selected by the trustees according to law, or appointed by himself. The contract shall be signed in duplicate by the superintendent and by the teacher, each retaining one copy. The contract shall show the name of

the school, the position of the teacher, whether a principal or assistant, and the monthly salary. In addition to the fixed salary, there shall be stated in the contract two successively smaller amounts which shall be the salary in case the attendance decreases to a number for which the conditional amounts would be the fixed salary. Contracts shall be valid for the number of months the school is to be taught during the scholastic year, and the following scholastic year, in the discretion of the board of trustees at the time of the making of the contract, it being the purpose hereof to authorize the board of trustees to elect a teacher, if it so desires, for two scholastic years, and authorize contracts therefor, and it shall be unlawful to issue a certificate for services rendered before the contract is made and signed; provided, that in years when the state appropriation is made after the beginning of the fall school term, that it shall be lawful for the county superintendent of education to cause the schools to be taught without contract until he shall have officially ascertained the amount of the common school fund that will be distributed to his county for that scholastic year; provided, further, that where contracts have been made before the amount of the school fund to be distributed to his county is known, the same may be changed when he ascertains the amount his county will receive, the teachers agreeing thereto; but the county superintendent shall have the right after the expiration of the four months required by the constitution, to make new contracts with teachers in counties making a special levy to carry on the schools for a longer term than four months, and all such contracts shall be made as the law provides, so that the amounts to be paid in salaries for maintaining all the schools one month shall not exceed that fractional part of the whole school fund, as provided by such special levy,

which one month is of the whole number of months the schools are to be taught.

SOURCES: Codes, 1930, § 6610; Laws, 1924, ch. 283; 1930, ch. 278; 1940, ch. 174.

§ 6284. County superintendents authorized to contract with teachers.—County superintendents of education are hereby authorized to contract with teachers in the public schools in accordance with the following limitations in reference to salaries:

(a) Third grade teachers between twenty dollars and forty dollars a month inclusive.

(b) Second grade teachers between thirty dollars and fifty dollars a month inclusive.

(c) First grade teachers between thirty dollars and two hundred dollars a month inclusive.

The salaries of principal and assistant teachers of separate school districts shall be fixed by the trustees, and the salaries of principals and assistant teachers of consolidated districts having a local levy, by the trustees and county superintendents of education.

§ 6290. General rules for teachers.—Every teacher in a public school must, before taking charge of a school and one week before closing a term, notify the county superintendent of the fact, naming the day of opening or closing, must enforce the course of study, the use of text books, and the rules and regulations prescribed for schools; and must hold pupils to a strict account for disorderly conduct on the way to and from school, on the playgrounds, or during recess, suspend for good cause any pupil from the school, and report such suspension to the board of trustees for re-

view. If his action be not sustained by the board, the teacher may appeal to the county superintendent, whose decision shall be final.

SOURCES: Codes, 1930, § 6617; Laws, 1924, ch. 283; 1930, ch. 278.

TRUSTEES

§ 6295. School districts classified and defined.—There may be five kinds of school districts as follows:

1. Common school district; an ordinary rural district organized by the county school board.

2. Consolidated district; one that is formed by consolidating two or more districts or parts of districts or one district and one or more parts of districts and contains an area of not less than ten square miles and in which authority to transport pupils is granted.

3. Special consolidated district; a consolidated district in which more than one school has been granted and located by the county school board for operation by the trustees of the district and which shall contain not less than twenty-five square miles of territory and not fewer than two hundred and fifty pupils.

4. Municipal separate district; one composed of the corporate limits of a municipality or the corporate limits of the municipality and added territory.

5. Rural separate district; any unincorporated district with an assessed valuation of not less than $200,000 or any unincorporated district of not less than sixteen square miles organized by the county school board in which a free public school is maintained for at least seven months with an average of not less than twenty-five children.

SOURCES: Codes, 1930, §6622; Laws, 1930, ch. 278.

Appendix

SEPARATE SCHOOL DISTRICTS

§ 6411. Separate school districts.—Any municipality, by an ordinance of the mayor and board of aldermen or other governing body thereof, may be declared a municipal separate school district. Any school district, not being a municipal school district, with an assessed tax valuation of not less than two hundred thousand ($200,000) dollars or any such district of not less than sixteen square miles may be declared a separate school district by the county school board, or boards, on a petition of a majority of the qualified electors therein or as provided by Section 6584 [Code of 1930; § 6274, Code of 1942], but shall not be entitled to the rights and privileges of a separate school district unless a free public school shall be maintained therein for a term of at least seven months in each scholastic year; and provided that there shall be at least an average attendance of as many as twenty-five pupils. Before the county school board, or boards, can declare any school district a separate school district as provided herein it must have abolished the said school district as provided in Section 6584, Section 6585 [Code of 1930; §§ 6274, 6275, Code of 1942], providing for outstanding obligations of dissolved districts, shall apply to such dissolved districts.

SOURCES: Codes, 1930, § 6657; Laws, 1924, ch. 283; 1930, ch. 278; 1934, ch. 263.

§ 6416. Municipal separate districts—tax levy—bond issues.—The mayor and board of aldermen or other governing body of a municipality constituting a separate school district, whether such district is composed of the corporate limits or the corporate limits and added territory, shall annually levy a tax on the entire separate district sufficient to

pay for fuel and other necessities for the public schools of the district, also for maintaining the school after the four months term provided by the State, or to supplement during said four months, said items being included in the annual budget submitted by the board of trustees, and if said items are included in the annual budget submitted by the board of trustees, the mayor and board of aldermen shall make a levy sufficient to cover the budget, or in lieu thereof, must call an election to determine the question of the levy; said election to be called upon a petition of twenty per cent. of the qualified electors of the district. The mayor and board of aldermen or commissioner of such municipality may also levy a tax on the entire school district, including added territory, to erect, repair and equip school buildings including teachers' homes, and may issue bonds of the separate district for that purpose in the manner provided by law. The taxable property of such added territory to such municipality shall be assessed and the tax collected for all school purposes, including bond issues for schools (whether issued in the name of the municipality or of such school district), in the same manner as on the property within the corporate limits, unless the governing body of such municipality shall by resolution spread upon its minutes and a certified copy thereof transmitted to the tax collector of the county in which such municipality is located, directing the tax collector of the county to collect the school tax upon the property added to such school district and lying outside the corporate limits of such municipality, stating to such tax collector the amount of the levy on such property of such district, and such tax collector shall receive as compensation for collecting such tax the same amount he may be entitled to receive for the collection of county taxes, and shall report to the governing body of such municipality his

collection of such school tax at the same time as he is required to report the collection of county taxes; on the question of levy for school and of issuance of school bonds provided for in this section the qualified electors and the taxpayers have the same rights and benefits as those within the corporate limits of such municipality. For the purpose of an election on a question pertaining to schools, such municipality shall cause the qualified electors in such added territory to be registered in like manner as those within the corporate limits, and governed by the same laws as far as applicable. And every municipality being a separate school district, may in like manner, levy and collect poll taxes for the maintenance of schools.

SOURCES: Codes, 1930, § 6662; Laws, 1924, ch. 283; 1930, ch, 278; 1934, ch. 260.

§ 6422. Trustees of separate school districts.—Separate school districts are of three classes, municipal, rural and line. The schools of a separate district shall be under the control of five trustees, each to be chosen for a term of five years, but so chosen that one will be elected each year. All terms shall date from date of election on the first Saturday of March, except municipal trustees whose terms shall date from January 1st.

To be eligible to the office of trustee of a separate district, a person must possess the following qualifications:

1. Must be a bona fide resident of the district.
2. Must be a qualified elector.

A member of the board of aldermen, county school board, trustees of a private or sectarian school or college in the same separate school district shall not be eligible to the office of trustee.

a. Municipal.

The trustees of a municipal district shall be elected by the mayor and board of aldermen or other governing body at the first regular meeting in January. All vacancies for the unexpired part of a term shall be filled by selection of the mayor and board of aldermen.

b. Rural.

The trustees of a rural separate district shall be elected. On the first Saturday of March of each year the qualified electors of each rural separate school district shall meet at the schoolhouse in said district at 2 o'clock p. m., organize by electing a chairman and a secretary of said meeting; then elect by ballot one trustee who shall assume the duties of his office as soon as elected for a term of five years. At each such meeting the trustees, whose terms do not expire in that year, shall have prepared and present a list of names of the qualified electors of such district who are entitled to vote for trustees . It shall be the duty of the county superintendent of education to obtain said list of qualified electors from the circuit clerks' office and furnish same to each school district trustees in advance of the election. No proxies shall be allowed. The chairman and secretary shall forthwith certify the result of the election to the county superintendent, if he shall not have been present at said election, and cause the certificate thereof to be delivered to him within five days following said election. The county superintendent of education shall cause a notice of said election to be posted in three public places in the school district, one of which places shall be the front door of the school building, one week prior to said election and the principal teacher shall, in addition thereto, announce the

date and purpose of the election to the pupils three times during said week.

c. Line.

For line rural separate school district, the same manner of procedure shall govern the selection of trustees in all line school districts as is outlined in subsection (b), for rural separate schools except the five trustees shall be apportioned amongst the counties as follows:

The territory in the county in which the school building is located shall never have less than three (3) trustees on the board, and where only two counties are involved, the territory in the county in which the school building is not located shall have two (2) trustees on the board, provided said territory furnishes as many as one hundred pupils and where it furnishes less than one hundred pupils it shall have one trustee on the board and the county in which the school building is located, shall, in that case, have four (4) trustees.

Where three (3) counties are involved then in that case the territory in each one of the counties in which the school building is not located shall have one trustee on the board, and in all cases the trustee shall be selected by the qualified electors of the territory which he or she will represent on the board, and notice of said selection shall be given to the county superintendent of the county in which the school building is located in case he be not present at the election.

The powers and duties of trustees under the general law shall apply to the trustees of separate school districts and they shall be subject to the same penalties. The board of trustees shall notify the mayor and board of aldermen in a municipal district of a vacancy from any cause and shall

notify the county superintendent of any vacancy in a rural separate district.

§ 6423. Trustees of separate school districts—powers—duties.—The powers and duties of separate school district trustees are as follows:

(1) To prescribe and enforce rules, not inconsistent with law or those prescribed by the state board of education, for their own government and government of schools, and to transact their business at regular and special meetings called for such purpose, notice of which shall be given each member.

(2) To designate a custodian or custodians of the school building, grounds, and property of the school district, and to make all needful rules and regulations concerning the duties and powers of such custodian or custodians; to authorize the use of the school buildings and grounds for the holding of public meetings or gatherings of the people, under such rules and regulations as said board of trustees may prescribe; to have full charge of the erection, repairing, or equipping of school buildings; and to employ janitors.

(3) To appoint librarians, and to enforce the rules prescribed for the government of school libraries.

(4) To exclude from the schools and school libraries all books or papers of a sectarian, partisan, denominational, or immoral character.

(5) To visit every school in their district at least once in each month, and examine carefully into its management, condition and wants.

(6) To maintain all the schools under their control for an equal length of time during the year; and to provide schools for Indian children living within the district in the manner and under the same regulations as schools are provided for the children of other races.

(7) To furnish blackboards and other necessary furniture, books, equipment, and apparatus for the use of the schools; to provide transportation when necessary for the children in their respective districts who live two miles or more from the schoolhouse, and pay for same out of the school funds of the district, as teachers' salaries are paid.

(8) To elect a superintendent, if one be required, and a principal for each of the schools, and prescribe their powers and duties.

(9) To elect teachers, fix salaries, terms of service, contract with them and impose fines, penalties for neglect of duty, but they cannot contract with a principal or a teacher who does not hold a license or certificate from the county superintendent or state board of examiners. In fixing salaries, boards of trustees shall take into consideration the character, academic and professional training, executive ability, and teaching capacity of the teacher.

(10) To contract with superintendents, principals and teachers, for a term of years not exceeding three years, said salaries at the option of the board to be made payable monthly, twelve months in the year; to pay teachers for the time lost on account of closing of schools by county or state health officers, or by boards of trustees in emergency cases; provided, such action is approved by the state board of education. The amount to be paid shall be determined by the board of trustees.

(11) To require the principal of each school to keep the records thereof in such a manner as to show, by age, race, grade, and sex, the educable children who attend the school, the enrollment and the average attendance, and at the end of the term to make complete term report to the trustees, showing the above statistics and such others as may be required of the county superintendent for his annual report to the state board of education. The secretary of the trustees shall, within ten days after the close of the term, transmit their report to the county superintendent; and it shall be unlawful for the superintendent to issue pay certificates for the last months' attendance of county pupils until said report is filed with him.

(12) To enforce in schools the course of study and the use of textbooks prescribed and adopted by the proper authorities; to add the high school department; to charge tuition in said department, at their discretion; and, in cooperation with the principal of the school, to prescribe the course of study for the high school department.

(13) To determine annually the amount of money required for the support of the public schools and for carrying into effect all the provisions of the law in reference thereto; and in pursuance of this provision the trustees shall, on or before the fifteenth of July, of each year, submit in writing to the mayor and board of aldermen or other governing body an itemized estimate of the expenditures for the next scholastic fiscal year and of the whole amount of money to be received from the state and county and the amount required from the municipality for the above purposes; to be responsible for all expenditures for school purposes; and to write orders to the clerk of the municipality

or to the county superintendent to issue warrants or pay certificates on any available school funds of such districts.

(14) To make report to the county superintendent of all expenses in the district for educational purposes for the year, to conform to the financial report required of the county superintendent by the state board of education.

(15) To have authority, and it shall be their duty, to suspend or dismiss pupils, when the best interests of the schools make it necessary.

(16) To employ physical instructors and visiting nurses, and to provide for medical inspection of school children, acting either separately or jointly with other boards of trustees.

(17) In districts containing a municipality with a population of not less than ten thousand according to the most recent federal census, to employ one or more truant officers for the enforcement of the state compulsory school law; to fix the duties and salary of such officer and to exact of him such reports as they may deem necessary. Said officer, when appointed, shall be the executive agent under the board of the compulsory law in lieu of the county superintendent. The compensation of such truant officer shall be paid out of the school fund.

Sources: Codes, 1930, § 6665; Laws, 1924, ch. 283; 1930, ch. 278.

§ 6527. How common school fund to be distributed in counties.—The county common school fund (poll tax) shall be divided between the separate school districts of the county and that portion of the county not included in the separate school districts. Within thirty days after every

legal enrollment of the educable children of the state, and within thirty days after the organization of the separate school district, or a change has been made in the limits of one already organized in the county, the county superintendent of education shall certify to the clerk of the board of supervisors the number of educable children, to be determined from the official roll of the educable children on file in the chancery clerk's office, in each separate school district in the county, and the number of educable children outside the limits of the separate school districts. At each regular meeting of the board of supervisors it shall be the duty of the clerk of the board of supervisors to apportion the amount of undivided county school fund (poll tax) in the county treasury among the separate school districts of the county and schools of the county outside of the separate school districts, on the basis of the number of educable children in each, as furnished by the county superintendent of education and to certify the said apportionment to the board of supervisors, who, if the apportionment is found to be correct, shall order that a warrant be issued in favor of the treasurer of each separate school district for the amount due each district.

SOURCES: Codes, 1930, § 6733; Laws, 1924, ch. 283; 1930, ch. 278.

§ 6528. Balances—how and when used—funds not loaned.—If there shall remain a balance in the treasury to the credit of the school fund of the several counties and separate school districts, on the thirtieth day of June in any year, the board of supervisors and trustees of separate school districts, respectively, during the month of July following may apply such balance to the building, repairing or furnishing with school furniture or apparatus such school-

houses which belong to the county or separate school districts, not appropriating to any school located in the county or separate school district an amount greater than one hundred and fifty dollars, unless an amount equal to any excess of this sum, to be appropriated by the county, be contributed and paid into the county treasury by the patrons of the public schools making such application and receiving such appropriation. All balances not so appropriated shall be carried forward to the school fund for the next scholastic year; and this shall apply to any fund that may have been levied by the county to carry on the schools for a longer term than four months. It shall be unlawful to loan any portion of the school fund.

Sources: Codes, 1930, § 6734; Laws, 1930, ch. 278.

§ 6541. Municipal separate districts—budgets.—It shall likewise be the duty of the board of trustees of each municipal separate school district, on or before the fifteenth day of July of each year, to prepare and file with the State Superintendent of Education a budget of expenditures for the support, maintenance and operation of the public schools of such separate school district during the fiscal year commencing on the first day of such July. Such budget shall contain a detailed statement of the estimated amounts to be expended for teachers' salaries, transportation, if any, and other expenses to be incurred in the operation of the separate school district school, or schools, during the year. Such budget shall also show the number of months for which funds will be available for the operation of the separate school district school, or schools, during the school session, and the estimated cost of operation for each month.

Sources: Laws, 1936, ch. 255.

§ 6542. Same—revenues.—It shall also be the duty of the board of trustes of each municipal separate school district at the same time to prepare and file with the State Superintendent of Education a detailed statement of the revenues which will be available for the support and maintenance of the separate school district school, or schools, during the fiscal year. Such statement shall show in separate items the amount to be received from the State common school fund and the State equalizing school fund, if any, and the estimated amounts to be received from the separate school district tax levy, or levies, or any other sources which may be available for the support and maintenance of the separate school district school, or schools, during the fiscal year, and also the balance of money on hand to the credit of the separate school district on the first day of July, and the total amount of funds which will be available for the support and maintenance of the separate school district school, or schools, during the fiscal year.

SOURCES: Laws, 1936, ch. 255.

§ 6543. Approval of budgets—disapproval.—The State Superintendent of Education shall carefully examine the county school budgets and the separate school district budgets filed under the provisions of Sections 4 and 5 of this Act [§§ 6537-6542, supra] for the purpose of determining whether or not the revenues to be made available during the fiscal year will be sufficient to meet the expenditures provided for in such budgets. If the State Superintendent of Education shall find that the budget of expenditures will not exceed the amount of revenues to be made available for the support and maintenance of the public schools during the fiscal year, he shall approve the same in writing, and shall certify his approval of such budget to the county su-

perintendent of education, or the board of trustees of such separate school district, as the case may be. If, in the opinion of the State Superintendent of Education, the revenues to be made available for the support and maintenance of the public schools of the county, or separate school district, as the case may be, during the fiscal year will be insufficient to meet the expenditures provided for in such budget, the State Superintendent of Education shall return such budget to the county superintendent, or the board of trustees of such separate school district, as the case may be, for revision and shall require the county superintendent, or the board of trustees of such separate school district, to revise such budget by reducing the estimated expenditures in such amount as may be necessary to balance the expenditures against the estimated receipts.

SOURCES: Laws, 1936, ch. 255.

§ 6558. Same—municipal separate districts.—The mayor and board of aldermen, or other governing authority, of any municipality constituting a municipal separate school district, whether such municipal separate school district be restricted to such municipality or include added territory, which on the date of the approval of this Act may have any valid and undisputed school tax anticipation notes, teachers' pay certificates, or other obligations outstanding, for the payment of which there are insufficient funds on hand and which cannot be paid out of the school funds made available for the current fiscal year ending June 30, 1936, is hereby authorized and empowered to borrow money in an amount sufficient to pay such valid and undisputed obligations, and to issue interest bearing negotiable notes or certificates of indebtedness therefor. The proceeds derived from the sale of such notes or certificates of indebtedness shall be applied

to the payment of such valid and undisputed obligations outstanding.

Such notes or certificates of indebtedness shall bear interest at a rate not to exceed six (6%) per cent. per annum, interest payable annually, and shall mature serially within three years from the date of their issuance, and not less than one-third part of the principal thereof shall mature each year until all of said notes or certificates are paid. Such notes or certificates of indebtedness shall be signed by the mayor and shall be countersigned by the municipal clerk, who shall impress the seal of his office upon each such note or certificate of indebtedness as it is issued; and each such note or certificate of indebtedness shall be registered by the clerk in a book kept by him in his office. Such notes or certificates of indebtedness shall constitute the valid obligations of such municipal separate school district and shall be payable out of a special tax to be levied by the mayor and board of aldermen, or other governing authority of such municipality, upon all the taxable property of such municipal separate school district. It shall be the duty of the mayor and board of aldermen, or other governing authority of such municipality, to levy annually, at the time other municipal and separate school district taxes are levied, a special tax upon all the taxable property of such municipal separate school district sufficient in amount to pay the principal and interest of such notes or certificates of indebtedness when and as the same shall become due. Such notes or certificates of indebtedness may be issued with interest coupons attached and such interest coupons shall bear the facsimile signatures of the mayor and clerk. If, however, no interest coupons are attached, the interest payments on each such note or certificate of indebtedness shall be properly credited

on the back of such note or certificate of indebtedness at the time such interest payments are made.

In the event the mayor and board of aldermen, or other governing authority of such municipality, shall be unable to borrow money for the payment of such valid and undisputed obligations of such separate school district outstanding on the date of the approval of this Act, the mayor and board of aldermen, or other governing authority of such municipality, is hereby authorized and empowered, in their discretion, to levy a special tax upon all the taxable property of such separate school district sufficient in amount to pay such outstanding obligations, such tax to be levied at the time other municipal and separate school district taxes are levied. If the amount of the tax levy required to retire such obligations shall exceed two mils on the dollar on all the taxable property of such separate school district, the mayor and board of aldermen, or other governing authority of such municipality, may levy such tax at a rate not to exceed two mills annually over a period of years until all such valid and undisputed obligations shall have been paid.

The funds derived from the special tax, levied under the provisions of this section, shall be kept separate from all other funds of such municipal separate school district and shall be used for the purpose herein stated and for no other purpose.

SOURCES: Laws, 1936, ch. 255.

§ 6569. **Separate school districts.**—In the event a separate school district shall levy a ten-mill tax for the support and maintenance of the separate school district schools to be used in the payment of teachers' salaries, transportation and necessary expenses of administration, and the

school fund of such district, including its share of the State per capita distribution, its share of the county poll tax and transfer tuition, shall be insufficient to pay teachers salaries, transportation, and transfer tuition charges of such separate school district for a term of eight months in each scholastic year under the terms and conditions imposed in this Act, such separate school district shall be eligible to participate in the distribution of the State equalizing fund upon the terms and conditions provided in Section 3 hereof [§ 6566, supra] for the county; and the amount of funds to be allotted to such separate school district shall be determined on the same basis as is provided in said Section 3 [§ 6566, supra] for the county.

SOURCES: Laws, 1936, 2nd Ex. ch. 1.

§ 6570. Emergency expense fund.—The State Board of Education shall be authorized to reserve the sum of $25,000.00 out of the State equalizing fund each year for the purpose of meeting special conditions and emergency situations in any counties or school districts in the State, which cannot be provided for otherwise under the provisions of this Act, and said funds may be allotted by the State Board of Education in such manner as it may deem best having in mind the purposes for which the State equalizing fund is appropriated. The State Board of Education shall be required to furnish an itemized account of any expenditures from this fund, and report same to the next regular session of the legislature.

SOURCES: Laws, 1936, 2nd Ex. ch. 1.

§ 6571. Regulation of expenditures.—It shall be the duty of the State Board of Education to prescribe rules and regulations governing the expenditure of the public

school funds of the county by the county superintendents of education and the expenditure of the separate school district funds by the trustees of the separate school districts for administration and office expenses in those counties and separate school districts whose schools are maintained in part by appropriations out of the State equalizing fund. The State Board of Education shall be authorized to impose limitations, in addition to the limitations already imposed by law, upon the amounts expended by the county superintendents for office help and supplies. But in no event shall such expenditures exceed the amounts authorized by law.

SOURCES: Laws, 1936, 2nd Ex. ch. 1.

§ 6572. Regulation of salaries—violations.—The State Board of Education is hereby authorized, and it shall be its duty, to prescribe reasonable rules and regulations for the fixing of salaries of teachers in those counties, separate school districts, consolidated school districts, and other school districts, whose schools are maintained in part by appropriation out of the State equalizing fund. The average monthly salaries to be paid to teachers in counties, separate school districts, and other school districts, which levy a tax of ten mills for maintenance purposes shall be so limited in amount as to permit the operation of the public schools in the county, or separate school district, or other school district, as the case may be, for a term of eight months in each scholastic year.

And no county, or separate school district, or other school district, participating in the benefits of the State equalizing fund, which levies a tax of ten mills, shall be permitted to pay to teachers monthly salaries in excess of approximately one-eighth of the amount fixed in the county

or school district budget for the payment of teachers' salaries during the school year. The average monthly salaries to be paid to teachers in counties and school districts participating in the benefits of the State equalizing fund, which levy a tax of less than ten mills for maintenance purposes and in which the public school term is less than eight months in any scholastic year shall not exceed the average monthly salaries paid to teachers in counties which maintain an eight months' term: Provided, however, that in counties having a ten-mill tax levy for the maintenance of the public schools of the county any school district having a separate tax levy may supplement the salaries of teachers out of the funds derived from such district tax levy; and provided, further, that in counties which are eligible to participate in the benefits of the State equalizing fund, but which have a county-wide tax levy for school maintenance which is less than ten mills on the dollar, any school district, which has a special district tax levy for maintenance purposes in excess of the amount required to maintain an eight months' term may supplement the salaries of teachers out of the funds from such excess district tax levy.

SOURCES: Laws, 1936, 2nd Ex. ch. 1.

§ 6574. Teachers.—The State Board of Education is hereby authorized to prescribe rules and regulations imposing additional restrictions upon the number of teachers who may be employed in counties which participate in the benefits of the State equalizing fund, whose salaries are to be paid out of the public school fund of the county, and the number of teachers who may be employed in school districts whose public school funds are made up in part by appropriations out of the State equalizing fund, and may make special allowance for additional teachers who may

APPENDIX

SENATE BILL NO. 500

AN ACT MAKING AN APPROPRIATION FOR THE SUPPORT AND MAINTENANCE OF THE COMMON SCHOOLS OF MISSISSIPPI FOR THE FISCAL YEARS 1950 AND 1951.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

SECTION 1. That the following sums, or so much thereof as may be necessary, be and the same are hereby appropriated out of any money in the state treasury not otherwise appropriated, for the support and maintenance of the common schools of Mississippi for the fiscal years 1950 and 1951, beginning July 1, 1950 and ending June 30, 1952, as follows:

For the support and maintenance of the common schools for the fiscal year 1950 for the per capita fund ..... $8,750,000.00.

An additional sum known as the equalizing fund to be disbursed by the State Board of Education in the manner of equalizing public school terms throughout the state, which shall be used exclusively for equalization of the school terms, teachers' salaries and other expenses necessary in the maintenance of such schools, and no part of the same shall be used for salaries or other compensation of any kind except in the payment of such amounts as are specifically authorized by law ..... $8,750,000.00.

For the support and maintenance of the common schools for the fiscal year 1951 for the per capita fund ..... $8,750,000.00.

An additional sum known as the equalizing fund to be disbursed by the State Board of Education in the manner of

equalizing public school terms throughout the state, which shall be used exclusively for equalization of the school terms, teachers' salaries and other expenses necessary in the maintenance of such schools, and no part of the same shall be used for salaries or other compensation of any kind except in the payment of such amounts as are specifically authorized by law ..... $8,750,000.00.

As an additional supplemental appropriation to be used for increasing the salaries of teachers in the colored schools, and to help equalize the salaries of teachers in the colored schools, to be disbursed by the State Board of Education in the manner provided in Senate Bill No. 501, Laws of Mississippi, 1950, for the fiscal year 1950 ..... $1,500,000.00.

As an additional supplemental appropriation to be used to help defray the expenses of school transportation for colored schools, to be disbursed by the State Board of Education in the manner provided in Senate Bill No. 501, Laws of Mississippi, 1950, for the fiscal year 1950 ..... $500,000.00.

As an additional supplemental appropriation to be used for increasing the salaries of teachers in the colored schools, and to help equalize the salaries of teachers in the colored schools, to be disbursed by the State Board of Education, in the manner provided in Senate Bill No. 501, Laws of Mississippi, 1950, for the fiscal year 1951 ..... $1,500,000.00.

As an additional supplemental appropriation to be used to help defray the expenses of school transportation for colored schools, to be disbursed by the State Board of Education in the manner provided in Senate Bill No. 501, Laws of Mississippi, 1950, for the fiscal year 1951 ..... $500,000.00

That none of additional funds shall be used in increasing supervisory or administrative costs above the July 1, 1948-June 1950 costs of same.

SECTION 2. That this act take effect and be in force from and after its passage.

SENATE BILL NO. 501

AN ACT TO PROVIDE AND SPECIFY HOW THE SUPPLEMENTAL APPROPRIATIONS MADE BY SENATE BILL NO. 500 OF THE REGULAR 1950 SESSION FOR INCREASING THE SALARIES OF TEACHERS IN THE COLORED SCHOOLS AND FOR DEFRAYING THE EXPENSES OF SCHOOL TRANSPORTATION FOR COLORED SCHOOLS SHALL BE DISTRIBUTED TO THE COUNTIES AND SEPARATE SCHOOL DISTRICTS AND TO REGULATE THE EXPENDITURES THEREOF.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

SECTION 1. That the additional supplemental appropriation made by Senate Bill No. 500 of the Regular Session of 1950 for increasing the salaries of teachers in the colored schools and for assisting in the equalization of such salaries with the salaries of teachers in the white schools for the fiscal years of 1950 and 1951 shall be disbursed and distributed by the State Board of Education to the respective counties and separate school districts upon the basis which the number of teacher units in the colored schools of each county and separate school district shall bear to the total number of teacher units in all of the colored schools of this state. The number of teacher units in the colored schools for the purposes of this act shall be ascertained by dividing by thirty (30) the number of colored pupils in average daily attendance for each county and separate school dis-

trict during the preceding school year as shown by the official reports filed with the State Board of Education. Distribution of the amounts to which each county and separate school district shall be entitled shall be made quarterly and at the same time as other school funds are distributed by the State Board of Education.

SECTION 2. It is the purpose of this act to insure that the entire amount of the additional supplemental appropriation referred to in Section 1 hereof shall be used solely and exclusively for the purpose of increasing the salaries of the teachers in the colored schools and for aiding and assisting in equalizing such salaries with the salaries of teachers in the white schools. For such purpose it shall be mandatory that for the school years 1950-1951 and 1951-1952 each county and separate school district shall allot, budget and expend for the payment of salaries of teachers in the colored schools from all other available school funds, exclusive of the additional supplemental appropriation above referred to, an amount which shall not be less in the aggregate than the amount expended for such purpose during the 1949-1950 school year and it shall also be mandatory that the average annual salaries paid to teachers in the colored schools in each such county and separate school district during the school years of 1950-1951 and 1951-1952 which are paid from school funds other than the additional supplemental appropriation shall not be less than the average annual salary paid to teachers in the colored schools during the school year 1949-1950. Provided, however, that nothing contained in this act shall be construed to permit the payment of salaries to teachers in the colored schools of any salaries in excess of the average annual salary paid to teachers holding the same type of certificate in the white schools.

Provided, however, that after the salaries of teachers in the colored schools in any county or separate school district have been equalized with the salaries of teachers in the white schools holding the same type of certificate, and that fact has been determined by the State Board of Education, any balance, if any, remaining in the additional supplemental appropriation made by Senate Bill No. 500 of the Regular Session of 1950 and distributed to such county or separate school district for increasing the salaries of teachers in the colored schools and for assisting in the equalization of such salaries with the salaries of teachers in the white schools may, with the approval of the State Board of Education, be transferred to the general county school fund or separate school district fund, as the case may be.

SECTION 3. On or before June 1 of each year the State Board of Education shall give tentative notice to each county and separate school district of the amount of funds to which such county or separate school district shall be entitled from the additional supplemental appropriation referred to in Section 1 hereof for the ensuing fiscal year, and on or before July 1, said State Board of Education shall give final notice to each such county and separate school district of the amount to which the same is so entitled. Within fifteen days after the close of the first school month the county superintendent of education of each county and the board of trustees of each separate school district shall file with the State Board of Education a report showing the total number of teachers in the colored schools employed for that year, the amount of salary to be paid each such teacher and the total salaries to be paid such teachers during such school year, together with like

information for the 1949-1950 school year, which report shall contain a statement to the effect that the terms and provisions of this act are being fully complied with. If such report should not be filed or if such report should show that the terms and provisions of this act are not being complied with, then the State Board of Education shall suspend all further payments under this act to such county or separate school district, as the case may be, until the necessary report is filed showing full compliance with the provisions hereof. Such reports shall be filed on forms prescribed and furnished by the State Board of Education and the said State Board of Education shall have full authority to require such information in addition to that prescribed herein as it may deem necessary and proper for the purpose of carrying out the purposes of this act.

SECTION 4. That the additional supplemental appropriation made by Senate Bill No. 500 of the Regular Session of 1950 for the purpose of helping in defraying the expenses of school transportation for colored schools for the fiscal years of 1950 and 1951 shall be disbursed and distributed by the State Board of Education to the respective counties and separate school districts upon the basis which the number of colored pupils in average daily attendance for each county and separate school district for the preceding fiscal year as is shown by the official reports filed with the State Board of Education shall bear to the total number of colored pupils in average daily attendance in all of the colored schools of this state; provided, however, that in determining the average daily attendance under the provisions of this section there shall be excluded therefrom the pupils in the colored schools of the separate school districts who reside within the limits of an incorporated municipality. Distribution of the amounts to which each

county and separate school district shall be entitled under the provisions of this section shall be made quarterly and at the same time as other school funds are distributed by the State Board of Education.

SECTION 5. To insure that the entire amount of the additional supplemental appropriation referred to in Section 4 shall be expended solely and exclusively for the purpose of defraying the expenses of school transportation for colored schools, the State Board of Education shall have the power and authority to require reports from county superintendents of education and boards of trustees of separate school districts as may be necessary for the purposes of the administration of this act, including specifically the authority to require from the trustees of separate school districts a report as to the number of colored pupils in average daily attendance in such separate school districts during the preceding fiscal year who resided within such separate school districts but outside of the corporate limits of the municipality.

SECTION 6. On June 1 of each year the State Board of Education shall give tentative notice to each county and separate school district of the amount of funds to which such county or separate school district shall be entitled from the additional supplemental appropriation referred to in Section 4 for the ensuing year, and on July 1 the said State Board of Education shall give final notice to each such county and separate school district of the amount to which same is entitled. If any county or separate school district should fail to comply with the provisions of this act relative to the additional supplemental appropriation to defray the expenses of transportation to public schools, the State Board of Education shall suspend all payments to such

county or separate school district out of such appropriation until the terms and provisions of this act with regard thereto are fully complied with by such county or separate school district.

SECTION 7. That this act shall take effect and be in force from and after its passage.

MISSISSIPPI LAWS 1948, CHAPTER 279

House Bill No. 469

AN ACT TO AMEND SECTION 6281, MISSISSIPPI CODE OF 1942, AS AMENDED BY CHAPTER 158, LAWS OF 1944, SO AS TO AUTHORIZE THE STATE BOARD OF EDUCATION, TO SET UP RULES AND REGULAIONS GOVERNING THE ISSUANCE OF ALL TEACHERS' CERTIFICATES, TO ELIMINATE PROVISION GOVERNING EXAMINATION, AND TO ELIMINATE PROVISION FOR GRANTING PROFESSIONAL CERTIFICATES TO GRADUATES OF CERTAIN INSTITUTIONS OF HIGHER LEARNING, AND TO REPEAL SECTION 6249, 6250, 6251, 6280, 6674, 6675, 6676, 6677, 6728 AND 6734, MISSISSIPPI CODE OF 1942, AND CHAPTER 157, LAWS OF 1944.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI.

Section 1. That section 6281, Mississippi code of 1942, as amended by chapter 158, laws of 1944, be and the same is hereby amended to read as follows:

6281. Rules, etc.—The state board of education is hereby authorized empowered, and directed to set up, as

soon as practicable after the passage of this act, rules and regulations governing the issuance of all teachers' certificates, and to administer said rules and regulations. Such rules and regulations shall not be changed without giving a minimum notice of one year to all holders of teaching certificates affected by this act.

Section 2. That Sections 6249, 6250, 6251, 6280, 6674, 6675, 6676, 6677, 6728, and 6734, Mississippi code of 1942, and chapter 157, laws of 1944, be and the same are hereby repealed.

Section 3. That this act shall take effect and be in force from and after July 1, 1948.

Approved March 29th, 1948.

Georgia Code Annotated.

32-613. Schedules of minimum salaries.—The State Board of Education shall annually fix a schedule of the minimum salaries which shall be paid to the teachers of the various classes prescribed by them out of the public school funds of the State, which salary schedule shall be uniform for each of the classes of teachers fixed by the State Board of Education: Provided, however, that the State Board of Education, in its discretion, may authorize or provide for variations from such schedules whenever, in its discretion, such variations may be necessary. (Acts 1937, pp. 882, 886.)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 741

GLADYS NOEL BATES and RICHARD JESS BROWN, Individually and on Behalf of the Negro Teachers and Principals in the Jackson Separate School District,
Petitioners

vs.

JOHN C. BATTE, President; R. M. HEDERMAN, JR., Secretary; R. W. NAEF, W. R. NEWMAN, JR., and W. D. McCAIN, Constituting the Board of Trustees of Jackson Separate School District, and K. P. WALKER, Superintendent of Jackson Separate Schools,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

On this petition the court is not concerned with the question of whether the lower court's decision was correct or incorrect. "Certiorari cannot serve as a relief merely from an erroneous result"; nor is granting of the writ warranted merely to review the evidence or inferences drawn therefrom. Frankfurter and Landis in 43 Harvard Law Review, 33 @ 52. Field v. United States, 205 U. S. 292, 51 L. Ed. 807; Magnum Import Co. v. Coty, 262 U. S. 159, 67 L. Ed. 922; Southern Power Co. v. North Carolina Pub-

lic Service Co., 263 U. S. 508, 68 L. Ed. 413; United States v. Johnson, 268 U. S. 220, 69 L. Ed. 925; General Talking Pictures Corp. v. Western Elec. Co., 304 U. S. 175, 82 L. Ed. 1273.

Therefore, we will not here undertake to show that the administrative remedies provided by the laws of the State of Mississippi (admittedly not exhausted by petitioners) are adequate and complete; nor to point out how similar are the material facts in this case, and how substantially alike is the administrative remedy provided under Mississippi law, to the facts in, and the administrative remedy provided under Georgia law in the case of Cook v. Davis, 178 F. (2d) 595 cert. denied 340 U. S. 811, 95 L. Ed. 21.

The court is now concerned only with the question of whether the writ should be granted in order to secure uniformity of decision between the various courts of appeal on the particular matter involved, or to bring up a case involving questions of importance which it is in the public interest to have decided by this court Magnum Import Co. v. Coty, 262 U. S. 159, 67 L. Ed. 922. There are present here none of the reasons suggested by Rule 38-5 which might influence the court to grant the writ. There is no conflict of decisions. There is no question of public importance not heretofore settled by this court. On the contrary the principle upon which the lower court's decision rests is one long established and well settled.

That administrative remedies provided by state law must be pursued and exhausted before resort may be had to judicial proceedings in a federal court is a principle well settled by the decisions of this court. Prentiss v. Atlantic Coast Line, 211 U. S. 150, 53 L. Ed. 161; First National Bank v. Weld, 264 U. S. 784, 68 L. Ed. 784; Gorham Mfg. Co. v. State Tax Com. 266 U. S. 265, 69 L. Ed. 279;

Porter v. Investors Syndicate, 286 U. S. 461, 76 L. Ed. 1226; Pacific Tel. & Tel. Co. v. Seattle, 291 U. S. 300, 78 L. Ed. 810; Utley v. St. Petersburg, 292 U. S. 106, 78 L. Ed. 1155; Natural Gas Pipe Line Co. v. Slattery, 302 U. S. 300, 82 L. Ed. 276.

The doctrine "is of especial force when resort is had to the Federal Courts to restrain the action of state officers; where the federal power impinges on state activities under our Federal system." Cook v. Davis, 178 F. (2d) 595 cert. denied 340 U. S. 811; 95 L. Ed. 21; Natural Gas Pipe Line Co. v. Slattery, 302 U. S. 300 @ 311, 82 L. Ed. 276; Porter v. Investors Syndicate, 286 U. S. 461, 76 L. Ed. 1226; Mathews v. Rodgers, 284 U. S. 521 @ 525, 76 L. Ed. 447. cf: Alabama Public Service Com. v. Southern Ry. Co., __ U.S. __, 95 L. Ed. 708, decided May 21, 1951.

That the right sought to be enforced is one conferred by Federal law, or one guaranteed by the Federal Constitution does not in any wise affect the doctrine in its application. Such a contention would be "at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed, or threatened injury until the prescribed administrative relief has been exhausted." Myers v. Bethlehem Shipbuilding Co., 303 U. S. 41 @ 50, 82 L. Ed. 638; Aircraft & Diesel Corp. v. Hirsch, 331 U. S. 752, 91 L. Ed. 1796; Natural Gas Pine Line Co. v. Slattery, 302 U. S. 300, 82 L. Ed. 276; Utley v. St. Petersburg, 292 U. S. 106, 78 L. Ed. 1155; Pacific Tel. & Tel. Co. v. Seattle, 291 U. S. 399, 78 L. Ed. 810; Porter v. Investors Syndicate, 286 U. S. 461, 76 L. Ed. 1226; Gorham Mfg. Co. v. State Tax Com. 266 U. S. 265; 69 L. Ed. 279; First National Bank v. Weld, 264 U. S. 784, 68 L. Ed. 784; Prentiss v. Atlantic Coast Line, 211 U. S. 150, 53 L. Ed. 161.

That the right here asserted is conferred, or protected by the Civil Rights Statute (U.S.C.A. Title 8, Sec. 43) does not affect the doctrine. "Constitutional amendments and

federal statutes, dealing with race or color, were written, they have been interpreted and applied, not to discriminate in favor of Negroes, but to prevent discrimination against them, not to make, but to prevent a different rule for Negroes from for whites." Hampton v. Thompson, Cir. 5, 171 F. (2d) 535. Where the remedy is administrative, and not judicial, the rule has been uniformly applied even as to cases brought under the Civil Rights statutes, Trudeau v. Barnes, Cir. 5, 65 F. (2d) 563 cert. denied 290 U. S. 659, 78 L. Ed. 571, Cook v. Davis, Cir. 5, 178 F. (2d) 595 cert. denied 340 U. S. 811, 95 L. Ed. 21; Lane v. Wilson, 307 U. S. 268, 83 L. Ed. 1281, cf; Douglass v. Jeanette, 319 U. S. 157 @ 163, 87 L. Ed. 1324; Mitchell v. United States, 313 U. S. 80, 85 L. Ed. 1201; Henderson v. United States, 399 U. S. 816, 94 L. Ed. 1302.

II.

If the Court of Appeals had no jurisdiction then this Court has no jurisdiction to grant the writ here prayed for. Shanfrake Coal & Supply Co. v. Westchester Service Corp., 293 U. S. 449, 79 L. Ed. 583, Stratton v. St. Louis, Southwestern Ry. Co. 282 U. S. 10, 75 L. Ed. 135; Mansfield, etc. Ry. Co. v. Swan, 111 U. S. 349, 28 L. Ed. 462; King Iron Bridge Co. v. Otoe Co. 120 U. S. 225, 30 L. Ed. 623; Cameron v. Hodges, 127 U. S. 322, 32 L. Ed. 132; Parker v. Owensby, 141 U. S. 81, 35 L. Ed. 654; Good Shot v. United States, 179 U. S. 87, 45 L. Ed. 101.

In the Court of Appeals a motion was made to dismiss on the ground that no appeal was perfected from the final judgment entered in the District Court; the attempted appeal being from an opinion of that court rather than from its judgment. The motion appears in the transcript at page 267, and was based on these facts:

On February 22, 1950, the District Judge entered an opinion in this cause (Tr. p. 254-257); and on March 20,

1950, petitioners undertook to perfect an appeal therefrom to the Court of Appeals by filing with the Clerk of the District Court a notice of appeal and a cost bond Tr. pp. 258, 259. The notice recited that the appeal is taken "from the judgment of the court entered on the 22nd day of February, 1950."

The final judgment was entered on March 22, 1950 Tr. p. 265.

No steps whatsoever were taken, within thirty days after the judgment of March 22, 1950, was entered, to perfect an appeal therefrom. However, on November 2, 1950, petitioners filed in the District Court their motion for an order authorizing them to amend nunc pro tunc the notice of appeal theretofore filed by them, or in the alternative for an order entering final judgment nunc pro tunc as of February 22, 1950. The District Court denied this motion, after entering findings of fact and conclusions of law among which were (a) non-excusable neglect of petitioners attorneys, and (b) lack of jurisdiction to enter the order. (These proceedings do not appear in the printed transcript, but were sent up in their original form to the Court of Appeals and from there to this Court).

The appellate jurisdiction of the Courts of Appeal is derived from Section 1291 of the Judicial Code (28 U.S. C.A. Sec. 1291) and is limited to a review of final decisions except as otherwise therein specified. The final judgment rule is an historic characteristic of Federal Appellate Practice. It has been embedded in our jurisprudence since the Judiciary Act of 1789; and since that time the uniform policy of Congress and of settled rules of practice and procedure has been to limit review to final decisions save only for those interlocutory orders and decrees specifically made appealable by statute. Cohen v. Beneficial Industrial Loan Corporation, 337 U. S. 541, 93 L. Ed. 1521; Commissioner

v. Bedford, 325 U. S. 283, 89 L. Ed. 1611; Catlin v. United States, 324 U. S. 229, 89 L. Ed. 911; United States v. Hark, 320 U. S. 531, 88 L. Ed. 290; Oneida Nav. Co. v. W. & S. Job. Co., 252 U. S. 521, 64 L. Ed. 697; Collins v. Miller, 252 U. S. 364, 64 L. Ed. 616; The Mary Eddie, 60 U. S. 199, 15 L. Ed. 624.

The authorities uniformly hold that judgments become final only when they have been entered. Federal Rules of Civil Procedure, Rule 54, Rule 58, Rule 79(a); The Santa Rita, 281 Fed. 760, (5th Cir.); In Re: D'Arcy, 142 Fed. (2d) 313 (3rd Cir); Amsinck v. Springfield Groc. Co., 7 Fed. (2d) 855, (8th Cir.); Williamson v. Chicago Lumber Corp., 59 Fed. (2d) 918 (8th Cir.); St. Louis Amusement Co. v. Paramount, 156 Fed. (2d) 400 (8th Cir.); St. Louis Amusement Co. v. Paramount, 158 Fed. (2d) 30 (8th Cir.); Uhl v. Dalton, 151 Fed. (2d) 502 (9th Cir.)

Since the Federal Rules of Civil Procedure became effective in 1938 the question, as it relates to civil suits in the District Courts, has been removed from the field of controversy by Rule 58, which provides that "the judgment is not effective before such entry."

The authorities also uniformily hold that an opinion of the court is not a final judgment or decree, even though it may make findings of fact and conclusions of law, and direct the entry of a judgment or decree accordingly. Commissioner v. Bedford, 325 U. S. 283, 89 L. Ed. 1611; United States v. Hark, 320 U. S. 531, 88 L. Ed. 290; Herrick v. Cutcheon, 55 Fed. 6 (1st Cir.); In Re: D'Arcy, 142 Fed. (2d) 313 (3rd Cir.); The Santa Rita, 281 Fed. 760 (5th Cir.); Rardin v. Messick, 78 Fed. (2d) 643 (7th Cir.); Amsinck v. Springfield Groc. Co., 7 Fed. (2d) 855 (8th Cir.); Williamson v. Chicago Lumber Co., 59 Fed. (2d) 918 (8th Cir.); Wright v. Gibson, 128 Fed. (2d) 865 (9th Cir.); Peoples Bank v. Federal Reserve Bank, 149 Fed. (2d) 850

(9th Cir.); Breeding Motor Freight Lines v. Reconstruction Finance Corporation, 172 Fed. (2d) 416 (10th Cir.)

In the instant case notice of appeal was filed two days before any judgment was entered. The notice refers to "the judgment of this court entered on the 22nd day of February, 1950" but there was no such judgment, the document thus referred to being the written opinion of the District Judge. Under these circumstances the appeal was premature and the Court of Appeals was without jurisdiction to entertain it. Florian v. United States, 114 Fed. (2d) 990 (7th Cir.); reversed 312 U. S. 656, 85 L. Ed. 1105; Rardin v. Messick, 78 Fed. (2d) 643 (7th Cir.); Herrick v. Cutcheon, 55 Fed. 6 (1st Cir.); Meeker v. Baxter, 83 Fed. (2d) 183 (2nd Cir.); Studer v. Moore, 153 Fed. (2d) 902 (2nd Cir.); McAllister v. Dick Towing Co., 175 Fed. (2d) 652 (3rd Cir.); Amsinck v. Springfield Groc. Co., 7 Fed. (2d) 855 (8th Cir.); St. Louis Amusement Co. v. Paramount, 156 Fed. (2d) 400 (8th Cir.); St. Louis Amusement Co. v. Paramount, 158 Fed. (2d) 30 (8th Cir.); Wright v. Gibson, 128 Fed. (2d) 865 (9th Cir.); Peoples Bank v. Federal Reserve Bank, 149 Fed. (2d) 850 (9th Cir.); Uhl v. Dalton, 151 Fed. (2d) 502 (9th Cir.); Breeding Motor Freight Lines v. Reconstruction Finance Corporation, 172 Fed. (2d) 416 (10th Cir.)

Rule 73(a) Federal Rules of Civil Procedure and Section 2107 of the Judicial Code (28 U.S.C.A. Sec. 2107) provide that no appeal, except as otherwise expressly provided, shall bring any judgment before a Court of Appeals for review "unless notice of appeal is filed within thirty days after the entry of such judgment." In the present case no notice of appeal was filed with the Clerk of the District Court within thirty days after the judgment of March 22, 1950, was entered, or for that matter, at any time after it was entered. The efforts of petitioners to obtain an order authorizing them to amend, nunc pro tunc, the notice which

they had filed appealing from the Court's opinion, or in the alternative for an order entering final judgment nunc pro tunc as of February 22, 1950, were unavailing. In this situation The Court of Appeals was without jurisdiction, 28 U.S.C.A. Sec. 2107; Federal Rules of Civil Procedure, Rule 73(a); In re: D'Arcy, 142 Fed. (2d) 313 (3rd Cir.); Veritas Oil Corporation v. McLain, 4 Fed. (2d) 389 (5th Cir.); Vaughan v. American Insurance Co., 15 Fed. (2d) 526 (5th Cir.); The Fanny D. v. Southern S. S. Co., 112 Fed. (2d) 347 (5th Cir.); Morrow v. Wood, 126 Fed. (2d) 1021 (5th Cir.); Amsinck v. Springfield Groc. Co., 7 Fed. (2d) 855 (8th Cir.); Williamson v. Chicago Lumber Corp., 59 Fed. (2d) 918 (8th Cir.); St. Louis Amusement Co. v. Paramount, 156 Fed. (2d) 400 (8th Cir.); St. Louis Amusement Co. v. Paramount, 158 Fed. (2d) 30 (8th Cir.); Uhl v. Dalton, 151 Fed. (2d) 502 (9th Cir.); Liberty Mutual Insurance Co. v. Pillsbury, 154 Fed. (2d) 559 (9th Cir.)

CONCLUSION

For the reasons herein stated the petition for writ of certiorari should be denied.

Respectfully submitted,

RUFUS CREEKMORE
Standard Life Building
Jackson, Mississippi
Attorney for Respondents

E. W. STENNETT
Of Counsel.